STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 428.

PENNSYLVANIA WATER & POWER COMPANY and SUSQUEHANNA TRANSMISSION COMPANY OF MARYLAND,
Petitioners,

v.

FEDERAL POWER COMMISSION, and CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE and PUBLIC SERVICE COMMISSION OF MARYLAND, Intervenors,
Respondents.

REPLY BRIEF FOR THE PETITIONERS.

Statement.

In view of the confusing discussion of a multitude of largely irrelevant issues in respondents' briefs, it is now necessary to redefine the narrow issues actually in this case.

It is particularly important to make clear just what impact the Fourth Circuit decisions in the contract cases have on this case, in which the FPC orders against Penn Water are being reviewed in accordance with the statutory procedure under Section 313 of the Federal Power Act (the Act).*

The Fourth Circuit decisions affect this case in two ways:

(1) The Fourth Circuit held that the Baltimore and Safe Harbor contracts were illegal under the antitrust laws

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* Sections of the Act are referred to as numbered in the pamphlet filed in this Court by the FPC.

and state law and void in their entirety. Since the FPC orders direct that those contractual arrangements be continued, they can be sustained only if authority is found in the Federal Power Act for the FPC to order continuance of arrangements illegal under the antitrust laws and state law. Thus, the prime issue in this branch of the case is whether there is any such authority in the Act. None will be found (Point I below). The newly invented argument of FPC counsel that the FPC orders did not direct continuance of illegal arrangements is frivolous and is disposed of in subdivision (c) of Point I below.

(2) To the extent that determinations made in the FPC orders are based on the assumed continuance of the private contractual obligations and entitlements contained in the void contracts, the determinations are unfounded and therefore erroneous in view of the Fourth Circuit decisions holding the contracts null and void in their entirety. Thus, the prime issue in this branch of the case is whether determinations in the FPC orders are founded upon such contractual obligations and entitlements as distinguished from physical operations, which were wholly different. That they were so founded will be shown in Point II below. In this branch of the case there is no question of statutory authority. There could never be any statutory authority to issue orders on non-existent foundations.

The Fourth Circuit in the decisions discussed by the respondents was, of course, not reviewing the FPC orders against Penn Water (here under review) or the FPC orders against Safe Harbor (not here under review) and was therefore not acting on and changing either set of orders. Petitioners have never claimed otherwise.

However, when Penn Water in this proceeding brought to the attention of the FPC (January 28, 1949) the illegalities of the contracts, the FPC should have withdrawn its order of January 5, 1949, which directed continuance of the illegal arrangements and which was based in important respects on the assumed continuance of the illegal private obligations and entitlements. Since the FPC did not do so,

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the reviewing Court, the D. C. Circuit, should have set aside such orders.

The issues mentioned above are particularly clear-cut in view of the concessions which have been made by the FPC:

(a) The FPC has conceded that such a contract is illegal as a private contract.* The decisions of the Fourth Circuit as to such illegality stand as *res judicata* between the intervenors and petitioners.** In any event, those decisions are not on review here, and any reargument here of the issues they decided is beside the point. This brief will, therefore, contain no argument on points in intervenors' briefs relating to those issues.

(b) The FPC has conceded that the whole basis of the D. C. majority decision was erroneous by conceding that Section 10(h) of Part I of the Act was not impliedly repealed by Part II, as held by the D. C. majority, and that the Section has the same scope as the Sherman Act itself (FPC Br., pp. 63-4).

(c) The FPC also concedes that the arrangement which the FPC directed be continued stifles competition and removes all incentive on the part of Penn Water to compete (FPC Br., pp. 15, 18, 48, 61, 62) and that the payment provision is a revenue pooling arrangement which would be

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* Memorandum on unsuccessful motion to postpone argument herein (p. 3).

** This disposes of Consolidated's Brief Points I, III and V and the Maryland Commission's Brief Points 1 and 3c, which constitute an attempt to argue that the Fourth Circuit decisions are erroneous. This Court has denied certiorari as to the Baltimore contract case, 340 U. S. 906 (1950); the petition for certiorari as to the Safe Harbor contract case has not been decided. The only new issue presented by the latter petition is whether the Safe Harbor contract is substantially similar in effect to the Baltimore contract. Counsel for Consolidated conceded in the Baltimore contract case (Record in Safe Harbor contract case, p. 52) that the Safe Harbor contract was substantially identical. Both the District Court and the Fourth Circuit (unanimously) held the contracts were substantially identical. Consolidated has had one review of that question. Consolidated is not entitled to a second review of this purely private question which does not warrant the attention and time of this Court.

illegal under the antitrust laws as a contract between private parties (FPC Br., p. 60 fn. 44 and p. 68 fn. 46).

The plain fact is that the FPC has turned the business and management of Penn Water over to a competitor, Consolidated, under the guise of a rate order which, in the words of the FPC's brief below,

> "permits Penn Water's facilities to be operated as though they were under common ownership with Baltimore Company's facilities." (Tr., p. 5574).

It was this very system of operation, embodied in the Baltimore contract, under which Consolidated, by letter of November 23, 1948, prohibited Penn Water from building a new $20,000,000 addition to its steam electric generating plant at Holtwood, Pa., fueled by coal dredged from the Susquehanna River (free but for the cost of processing), which could now have been producing needed power for the defense effort. Instead, Consolidated used its contractual powers to take the business for itself, by building a new steam electric generating plant of its own in Baltimore, to be fueled by more expensive bituminous coal bought in the market.*

A large portion of the brief of the FPC, and the briefs of the intervenors, is taken up with a discussion of economic matters relating to the electric utility industry, apparently in an attempt to make it appear that determination of such matters, or consideration of the voluminous record relating thereto, is necessary or pertinent to the decision of this case. On the contrary, all that is necessary for the determination of this case are the parts of the opinions and orders of the FPC referred to in petitioners' main brief (p. 3), the provisions of the Federal Power Act, and

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* The Fourth Circuit emphasized this as one of the flagrant abuses of the contract system of operation. Consolidated asserts that the Court's finding as to this action of Consolidated was unsupported by the proceedings in the District Court, which upheld the contract. But the District Court itself expressly found that Consolidated under the contract prohibited Penn Water from building its steam plant "and instead, extended its own plant facilities in Baltimore" (89 F. Supp. 452, 460).

INDEX.

the adjudicated fact that the Baltimore and Safe Harbor contracts with their alleged entitlements and obligations are invalid and non-existent as private contractual obligations.*

There is here no case for administrative expertise, but only a case of an administrative agency having issued orders which were clearly without foundation and beyond its authority as a matter of law, and having maintained its position even after these errors of law were pointed out to it. Here we have a direct review of orders issued by the FPC after the illegalities of the situation were brought to its attention. FPC counsel conceded in their brief below (Tr. 5552) that these arguments advanced by Penn Water

> "are not new, having been urged upon the Commission and considered by it and having been repeatedly urged in this proceeding before this Court."

Since this is a direct statutory review, as conceded in the FPC's brief (p. 59), the cases cited by the respondents, including *Far East Conference* v. *United States*, October Term, 1951, No. 15 Misc., relating to referral of questions of fact to administrative bodies when they have not passed on them, have no application. On the state of the record in the *Far East* case, the questions had not been passed on by the administrative body. The FPC does not really argue that the *Far East* case is applicable here, but only that it may have application to the Safe Harbor contract case.**

Furthermore, all the respondents' arguments regarding the necessity for finding background facts and the effects of the illegal arrangements are beside the point under con-

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* The orders here under review are expressly founded on both contracts; the invalidity of the Baltimore contract alone is a complete ground for setting the orders aside.

** This contention also is incorrect, because before the District Court or the Fourth Circuit decided either the Baltimore contract case or Safe Harbor contract case, the FPC had rendered its decision on the questions, albeit erroneously. However that may be, no one suggested in either contract case that there be such a referral, and counsel for the FPC was present in all courts and was furnished with all the briefs, as the Fourth Circuit found (194 F. 2d 89, 91 (1952)).

trolling decisions of this Court because the arrangements have been held illegal *per se* as a matter of law (Penn Water's main brief, pp. 24, 25). The FPC has had its full opportunity to advance its views; its views are erroneous as a matter of law and therefore should be reversed by the courts.

I. The FPC has no authority to direct continuance of arrangements illegal under the antitrust laws and state law, as it has attempted to do.

(a) Arrangements illegal under the antitrust laws.

To sustain the FPC orders here under review, some specific provision must be found in the Federal Power Act (or in some other Act of Congress) authorizing the FPC to direct continuance of arrangements otherwise illegal under the antitrust laws.

General regulatory provisions have never been construed as authorizing a regulatory body so to do, in the absence of some provision in the regulatory act (or the antitrust laws themselves) expressly giving the authority. We showed in our main brief (pp. 26-40 and App. A) that this Court, other regulatory bodies and the Attorney General have always so decided. Appendix A to our main brief contains a tabulation of provisions of Federal regulatory acts giving such specific authority, without which other regulatory bodies have not attempted to approve or direct continuance of illegal arrangements.

In order that there can be no question on this score, we submit as Appendix I to this brief a tabulation of general regulatory provisions in other Federal regulatory acts, which have never been held sufficient to permit the regulatory body to approve or direct transactions illegal under the antitrust laws. Where Congress intended to give such authority, it has enacted specific provisions, as also shown in the tabulation.

An examination of the tabulation shows that the subject matter of the regulatory provisions in these other acts

Table of Citations.

Cases.

Constitutional Provisions.

is, in most cases, more extensive than that in the sections of the Federal Power Act to which FPC counsel refer.

FPC counsel do not discuss the point made in our main brief (pp. 27-30) that the Federal Power Act does not contain any specific provision authorizing the FPC to approve or order transactions illegal under the antitrust laws, and that it was not until the recent amendment of Section 7 of the Clayton Act (on December 29, 1950) that the FPC was given the one power of this kind that Congress has ever conferred upon it, namely, the power to exempt acquisitions of stock or assets approved by it. They do not discuss the point that this is a clear indication that, prior to December 29, 1950, the FPC had no power to exempt such acquisitions, and thereafter had only the limited power to exempt such acquisitions and no other transactions. Nor do they discuss the further point that a provision giving the FPC authority to grant exemptions was dropped from the original bill when the Federal Power Act was enacted in 1935. They simply fail to meet the clear implication from these Congressional actions.

As previously pointed out, the FPC has conceded (Br., pp. 63-4) that Section 10(h) of Part I of the Federal Power Act was not, as argued by the D. C. Circuit majority, repealed by Part II, and that the Section has the same scope as the Sherman Act itself.* FPC counsel argue that, notwithstanding the presence of this prohibition in Penn Water's license, it is not binding, and the FPC may somehow waive it. But the government license is a bilateral contract binding on both the government and the licensee and the FPC may not waive any of the statutory conditions, including this one. Permission to the FPC to waive such a statutory condition is given in subsection (i) of Section 10 in two specific and limited instances only, i.e., in the case of a license for a minor part only of a whole project, or for a small project of not more than 100 horsepower, neither of which has any application here.

FPC counsel refer to general regulatory provisions of the Federal Power Act, contending that such provisions

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* The D. C. Circuit majority itself conceded this.

authorize the FPC to approve or direct the otherwise illegal arrangements. A brief analysis of such provisions will show that they do not contain any such authority.

Sections 205(a) and (b) are general regulatory provisions regarding rates and services of public utilities such as are found in the other Federal regulatory acts listed in Appendix I hereto and do not carry the requisite authority. Establishment of "just and reasonable" rates and preventing of "undue preference" does not carry with it any power to order an arrangement whereby one company is turned over to the control of another, and its incentive to compete with the other company is destroyed, in violation of the antitrust laws.

That such is the effect of the FPC orders is shown in our main brief (pp. 48-52; 58-68). The argument of FPC counsel that the orders do not do so is unfounded and is disposed of in subdivision (c) of this point below.

Section 206 implements Section 205 and also is a general regulatory provision for preventing rates of public utilities which are "unjust, unreasonable, unduly discriminatory or preferential" and determining the "just and reasonable rate." This is another general regulatory provision which does not carry the requisite authority. This section, like Section 205, provides that the FPC may adjust rates whether they are contained in a unilateral tariff or in a bilateral contract. That it so provides does not mean that the FPC has authority to create a bilateral contract, which is by its nature a consensual arrangement, when none exists. It is even more obvious that a contract which is illegal as between the parties could not be imposed. Furthermore, even if the FPC could create a contract, it would have to be done by an order binding on both parties. Here, the FPC has entered no order against Consolidated and it has conceded it is Penn Water which is subject to penalties under the orders issued (FPC Br., p. 53).

FPC counsel mention Section 207 (Br., p. 40, fn. 31). There is no authority in Section 207 to approve or direct continuance of contractual arrangements, illegal or otherwise. That section deals only with the matter of inade-

quate service. This language is general, like the other general regulatory sections referred to.

Section 203(a) mentioned by Consolidated (Br., p. 53), is irrelevant. Under it, the FPC may approve the sale or other disposition by a public utility of facilities, or the purchase by a public utility of a security of another public utility. This section has been present in the Act since its enactment in 1935. Yet, as pointed out above, Congress found it necessary in December 1950 to enact a specific amendment to Section 7 of the Clayton Act, in order to give the FPC power to exempt from the antitrust laws acquisitions approved by it under Section 203(a) of the Federal Power Act.

Section 202, cited by FPC counsel, clearly does not give the FPC the requisite authority. In fact, the policy outlined in subsection (a) is directly contrary to the assertions of FPC counsel. The policy is "assuring an abundant supply of electric energy throughout the United States", and encouraging "the voluntary interconnection and coordination of facilities". Subsection (b) provides that, where adjacent public utilities are not interconnected, the FPC may require interconnection and the exchange of energy. This is similar to the authority to require interconnections contained in the other Federal regulatory acts tabulated in Appendix I hereto (Column 7). Such a provision does not empower the regulatory body to direct an arrangement for the entire business of the public utility, but only for such interconnection. Section 202(b) is patently insufficient to empower the regulatory body to order an arrangement otherwise illegal under the antitrust laws in the absence of specific provisions such as are contained in some of the other Federal regulatory acts.*

Section 20 of Part I providing for the regulation of the interstate rates and services of licensees is another general regulatory provision providing for "reasonable, nondiscriminatory, and just" rates, to be regulated by the states

* Furthermore, none of the foregoing Sections 202, 205, 206, and 207 are applicable to licensees regulated under Part I of the Federal Power Act (see Point III below).

involved or, if they are unable to agree, by the FPC. There is no authority here to order contractual arrangements illegal or otherwise.

Section 4(g) of Part I provides for investigation of any attempted occupancy of public lands or streams and issuance of such order in that connection as may be appropriate. This section has no applicability to a licensee of the Federal Government legally occupying a power site and has no relation to contractual arrangements.

Section 4(e) relates to the issuance of licenses, *i. e.*, licenses containing the conditions required by Section 10, including the condition of Section 10(h) that licensees shall not make combinations or agreements to limit the output of electrical energy or restrain trade or fix prices, which FPC counsel concede restates the antitrust laws (Br., p. 64).

Section 10(a) provides for the inclusion in each license granted, of a condition that the physical project "including the maps, plans, and specifications" shall be such as in the judgment of the Commission is best adapted for developing the water power. This subsection has nothing to do with contractual arrangements.

There is nothing in any of these provisions cited by FPC counsel or the intervenors different from the broad regulatory authority in other acts, shown in Appendix I hereto, which have never been treated by either Congress or the Courts as conferring power on the regulatory body to order arrangements otherwise illegal under the antitrust laws, in the absence of specific provisions of the type tabulated in Appendix A to petitioners' main brief.

Nor is there any general repugnancy between the Act and the antitrust laws, as the dissenting opinion below and the Fourth Circuit pointed out. Penn Water can sell power to Consolidated under an arrangement which does not violate the antitrust laws. This would be under the usual form of unit rate contract, without managerial controls of Consolidated over Penn Water like the contracts Penn Water has with the three Pennsylvania utilities, which these same FPC orders also approve. This is the type of contract found elsewhere in the industry.

FPC counsel resort to another contention based on the assumed authority of the FPC to direct continuance of the arrangements, which authority we have shown does not exist. They claim that the arrangement directed here, whereby the business and management of Penn Water is turned over to its competitor, Consolidated, resembles the action of a commission of the State of California in fixing raisin quotas under the California Agricultural Prorate Act, which this Court held not to be action within the purview of the antitrust laws, because it was the act of the State. *Parker* v. *Brown*, 317 U. S. 341 (1943).

The situation here is not similar to that in *Parker* v. *Brown*. There the State Commission simply assigned a raisin quota to producers. Here by orders against Penn Water, the FPC is purporting to permit a private party, Consolidated, to control Penn Water and prevent Penn Water's competition, in violation of the antitrust laws.

Here, it is Consolidated, not the FPC, which the FPC's orders permit to perform acts violating the antitrust laws. Further, it is difficult to see how the FPC can exempt Consolidated from the antitrust laws in an order directed against Penn Water.

By its orders the FPC is attempting to confer on Consolidated powers which the FPC itself does not have under the Act. It is not claimed that the FPC has any power over installation of facilities of Penn Water such as steam electric generating plants.* Yet the FPC is giving Consolidated control over the expansion of such facilities by Penn Water. FPC counsel say in effect (Br., p. 53) that if Penn Water should disobey a direction of Consolidated it would be a violation of an order issued under the Act and subject Penn Water to penalties or restraints to be imposed by the FPC. Yet the FPC itself has no such authority over facilities under the terms of the Act. Obviously Consolidated therefore, in controlling Penn Water's expansion of facilities would be acting under an unauthorized dele-

* The FPC's powers with respect to construction of facilities are limited to those which are part of a licensed *hydroelectric* project (Section 10(b) of the Act) despite Consolidated's incorrect statements in this regard (CG Br., pp. 74, 75).

gation without statutory standards and at its own whim in its own interest. Thus, the FPC is trying to obtain by indirection a power it admittedly does not have under the Act.

The true significance of *Parker* v. *Brown* in the present case arises from the fact that, as this Court stated, a state or public authority "does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful" (317 U. S. at p. 351).

The situation here is analogous to that in the *Schwegmann* case (341 U. S. 384 (1951)). There this Court held that a state could not demand of private parties conduct which the Sherman Act forbids. The State of Louisiana required liquor retailers to abide by minimum prices fixed by contract between distributors and other retailers, though not parties to such contracts themselves. This requirement of Louisiana law did not come within the narrowly defined express power to exempt from the antitrust laws granted to the states by Congress in the Miller-Tydings Act.

In the case here the FPC is attempting to require Penn Water to follow the mandates of a competitor, Consolidated, not only as to prices at which it sells power to others, but in all phases of its business, and to give up all incentive to compete, obtain new business and economize. The orders require Penn Water to submit itself to actions by Consolidated, a private party, which violate the antitrust laws. Such a situation has no analogy to the case put by FPC counsel (Br., p. 59) that a regulatory body might fix rates for several utilities, though they could not legally agree among themselves on such rates.

The situation here is also like that in *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), where this Court struck down the Bituminous Coal Conservation Act of 1935, as unconstitutional under the Due Process Clause of the Fifth Amendment, because it turned phases of the business of some coal companies over to the direction of competitors. It is obvious that, if Congress itself has no constitutional power to hand the business of one corporation over to a

competitor, a regulatory commission cannot do so. Neither the FPC nor the intervenors attempt to distinguish the situation in this case from that in the *Carter Coal* case.

Moreover the FPC is a Federal agency which cannot direct continuance of contractual arrangements illegal under the antitrust laws without specific authority from Congress. The pattern of legislation shown in Appendix A to our main brief giving certain regulatory agencies specific authority in limited instances to grant exemptions from the antitrust laws demonstrates this conclusively.

The FPC concedes (Br., p. 49) that as to the approving or permitting of a contract which might otherwise contravene the Sherman Act "the Government has consistently maintained that express statutory authority and an exercise of that authority are needed to establish an exemption from the antitrust laws."

It is clear that there is no authority in the Federal Power Act for the FPC to order continuance of contractual arrangements whereby private parties violate the antitrust laws.

(b) Arrangements illegal under fundamental state law.

We have pointed out in Point II of our main brief that the arrangements here involved have been held to violate fundamental Pennsylvania law, including the doctrine of *ultra vires*, not mere regulations of Pennsylvania or its Public Utility Commission.

Just as in the case of the antitrust laws, the Federal regulatory body must have some express authority in its regulatory act in order to supersede state law of the fundamental organic character involved here. FPC counsel point to no provision of the Federal Power Act which contains such authority.

As we pointed out in our main brief, such provisions are contained in some other Federal regulatory acts (p. 70), for example, Section 5(11) of the Interstate Commerce Act.

Furthermore, as pointed out in our main brief (pp. 72-73), action of a Federal regulatory body supersedes state law only where this is necessary, in order to carry out the

purposes of the Federal regulatory act. FPC counsel can, of course, point to no such necessity here, because the purposes of the Federal Power Act can be carried out by the FPC's approval of an ordinary unit rate contract between Penn Water and Consolidated with no managerial controls of one company over the other, such as is customary in the industry.*

Consequently, the cases cited in the FPC brief (p. 86) to the effect that Federal laws override state laws when Congressional intent is expressed and necessity therefor exists are not in point.

Also not in point are the cases cited in the FPC brief (p. 89) relating to situations where the Federal Government has preempted a field. There is no such preemption here. The only statutory provisions pointed out by the respondents for the proposition that Congress in enacting the Federal Power Act intended to preempt the field either do not sustain them or prove the opposite.

Section 8 of the Federal Power Act provides that no voluntary transfer of a license, or rights thereunder, shall be made without the written approval of the FPC. But the corporate powers surrendered here are not rights under a license. That this is so is not only self-evident but is also shown by Section 9(b), which requires, as a condition of obtaining a license, that the applicant must prove that it is duly authorized under state law to conduct the business which it must conduct to operate under the license. This is a recognition of the fact that such corporate rights flow from the laws of the state of incorporation and not from a license under the Federal Power Act.

FPC counsel nowhere discuss the constitutional question under the Tenth Amendment which arises under the cases cited in our main brief (pp. 74-75) since the FPC

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* Consolidated admits this would be satisfactory (Br., p. 41). The efficient power pools found in other parts of the country operate under such ordinary contracts. In this connection, the illegal revenue pooling in the present FPC orders should not be confused with pooling of power, which is a matter of physical interconnection.

orders attempt to override these fundamental state laws, as distinguished from mere state regulation of rates and services.

(c) The claim of FPC counsel that the FPC orders did not direct continuance of illegal contractual arrangements is frivolous.

FPC counsel now claim (Br., p. 72) that the FPC order of October 27, 1949 contained a provision eliminating from the FPC orders "any provision which might be held unlawful in the course of Penn Water's antitrust litigation against Consolidated".

Obviously the D. C. Circuit recognized that the FPC had purported to continue arrangements violative of the antitrust laws. A large portion of the opinion of the majority was devoted to an argument in support of the FPC's power to do so, and the entire minority opinion was occupied with arguments to the contrary.

FPC counsel at one time asserted that the provisions of the Baltimore contract excluded are those of Articles IV and V and only such articles. Since the filing of petitioners' main brief FPC counsel claim that a phrase in Article II is also excluded by the alleged exception (Br., p. 83, fn. 58).

The whole contention is without foundation.

The principal FPC orders were those of January 5 and February 28, 1949. As pointed out in our main brief (pp. 48-52 and 58 to 68), those orders directed the whole "present arrangement" to be continued, merely changing the rate of return. There was no exception whatsoever in the orders. The order of February 28, 1949 expressly approved the restrictions contained in Article IV (on Penn Water's right to contract) and Article V (on expansion of Penn Water's facilities), and said no change could be made in the arrangement by Penn Water without filing the change with the FPC for its approval.

Following the entry of such orders, petitioners petitioned the D. C. Circuit, pursuant to Section 313(b) of the Act, to review the orders and the FPC filed the transcript

with the D. C. Circuit. Thereafter pursuant to that Section, that Court had "exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part."*

Thus the FPC order of October 27, 1949 was issued after the D. C. Circuit had exclusive jurisdiction to modify the original orders. It was also issued without any notice or any opportunity for hearing. Yet this is the order which contains the claimed exception.

The October 27, 1949 order approved the specified return method of payment, made further downward adjustment of rates so that the rate of return was reduced from the specified 5¼% to 4¾%, and then stated:

> "All other provisions of the aforementioned contracts, in and of themselves lawful prescribing or defining the power, energy and transmission services to be furnished, or any classification, practice, regulation or rule affecting such services, which several provisions are incorporated herein by reference, shall be observed and be in force" (R., Vol. 17, p. 5283).

This was obviously not designed to except any provision, but an attempt to sustain the legality of all the provisions of the contract to assist the intervenors, with whom the FPC has cooperated from the beginning of these litigations.

It was not until after the decision of the District Court sustaining the Baltimore contract had been reversed by the first Fourth Circuit decision, September 30, 1950, that this theory (admitted by FPC in its Brief, p. 31 to be a mere construction of the order) was evolved by FPC counsel and presented in their answer (November 28, 1950) to petitioner's motion to bring the Fourth Circuit decision before the D. C. Circuit in this case.

The contention of FPC counsel that certain contractual provisions were excepted, turns on the phrase "provisions of the aforementioned contract, in and of themselves lawful". Counsel state that Articles IV and V are the

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* The stay order of the D. C. Circuit, entered April 29, 1949, did not and could not reserve any jurisdiction in the FPC to change its original orders once jurisdiction had been vested in that Court, as now claimed by FPC counsel (Br., p. 25).

illegal provisions, although there is no indication whatsoever in the FPC order that those are the illegal provisions referred to or that there are any illegal provisions intended to be referred to. If the FPC had in fact intended to exclude Articles IV and V from its orders, it would have been a simple matter to have done so.

As pointed out in our main brief (p. 60), the contention that Article IV was thereby excluded is destroyed by the very order itself which, in another portion, expressly provides that the exclusive dealing provision contained in Article IV shall be continued (R., Vol. 17, pp. 5272-3). Furthermore, FPC counsel now admit (Br., p. 60) that the exclusive dealing provision of Article IV has been continued, terming it a service. Again, the order clearly continues the payment method which FPC counsel concede is illegal revenue pooling between private parties (Br., pp. 60-61, fn. 44) and which they concede was listed among the illegal provisions in the second Fourth Circuit decision (Br., p. 68, fn. 46).*

At the time the October 27, 1949 order was entered, there had been no decision by any court in the contract litigation. There had been a trial in the District Court and briefs filed by petitioners setting forth the many illegal features of the contract. As FPC counsel state (Br., p. 72) the FPC at that time knew the claims of illegality being made by petitioners (FPC counsel had all the briefs and were present in all the Courts). The Penn Water briefs, which FPC counsel then had, claimed that many provisions of the Baltimore contract were illegal, including the payment provision and provision for an operating committee, as well as Articles IV and V (Briefs of September 15, 1949, October 4, 1949 and October 17, 1949, in District Court). The provision in the October 27, 1949 order was obviously an attempt to bless rather than exclude the illegal provisions.

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* Both the first and second Fourth Circuit decisions included among the illegal provisions, the provision for an operating committee which gave Consolidated a vote over all managerial decisions of Penn Water and Safe Harbor, respectively (R. Vol. 18, p. 5328, and 194 F. 2d 89, 93).

Furthermore, it is absurd to say that a mature administrative body like the FPC was leaving the contents of an alleged rate schedule to be determined by others in other proceedings, even if it had authority so to delegate its function. It had no authority to do so. It also had no authority after the filing of the transcript in the D. C. Circuit, April 22, 1949, *itself* to make any change in its prior orders, let alone delegate authority to make a change.

Another inconsistency of this claim of respondents should be pointed out. While they state that the FPC left to the Fourth Circuit in the contract litigation the determination of what terms of the Baltimore contract were to be continued by the so-called tariff, the intervenors at the same time claim that the Fourth Circuit decision was an improper attack on the order. These conflicting contentions will simply not stand up.

The contention is made even more absurd by the contrary assertion of FPC counsel that the FPC directed the continuance of all of the contractual provisions of the Safe Harbor contract, when there is no substantial difference in this connection between the orders on Safe Harbor and the orders on Penn Water, except that the orders on Penn Water, unlike the Safe Harbor orders, specifically mention and direct continuance of the very illegal provisions which FPC counsel now state are excluded.*

Intervenor Consolidated argued to this Court in its petition for certiorari in the Baltimore contract case, which was denied (p. 20):

> "The Commission necessarily *approved every provision of the Basic Agreement*, except the pecuniary amount of the rates". [Italics Consolidated's.]

Moreover, the exclusion of Articles IV and V, and even the phrase in Article II now mentioned by FPC counsel, does not eliminate the difficulty that the FPC ordered continuance of illegal arrangements. The illegalities are

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* Obviously FPC counsel are taking these opposite positions to suit the procedural situation, there being no review case pending over the FPC Safe Harbor orders.

not contained only in Articles IV and V of the Baltimore contract. They permeate the whole contract, as shown in detail in Penn Water's main brief (pp. 60-62). Confronted with the details of such permeation, FPC counsel apparently decided in their current brief to concede that at least some of Article II was also illegal and was intended to be excepted. FPC counsel have never stated what other provisions they may claim are excepted.

No attempt is made by FPC counsel to argue the legality of the other provisions. For example, it is stated (Br., p. 62) that they "are merely ancillary". In fact FPC counsel claim the FPC can disregard the illegalities and say in their brief (p. 84) "the Commission's order is not invalidated because the contract as such may have been permeated with 'illegalities'."

We do not wish to repeat the exposition in our main brief (pp. 60-62) of the permeation of the whole contract by the illegalities. We point out, however, as an example that Article VIII provides for an operating committee which, without any of the other provisions, gives Consolidated a veto power over all of the managerial decisions of Penn Water, and which was specifically held to be illegal by the Fourth Circuit in both of its decisions (R., Vol. 18, pp. 5328-9; 194 F. 2d 89, 93).

In any event, FPC counsel concede and assert that the orders continued the illegal revenue pooling method of payment and the exclusive dealing arrangement whereby Penn Water is required to purchase any supplemental power it may need or desire from Consolidated. This exclusive dealing provision was expressly held by the Fourth Circuit to be illegal *per se* under Section 3 of the Clayton Act in the Baltimore contract case (R. Vol. 18, p. 5331). These provisions in themselves place Penn Water under the domination and control of Consolidated and permit Consolidated to eliminate all competition on the part of Penn Water and all competition in the sale of power to Penn Water on the part of other utilities with which Penn Water is connected.

The revenue pooling provision, which removes all incentive on the part of Penn Water, is as effective an instrument for suppressing competition as the direct power to veto other business, and also is a clear violation of doctrines of fundamental state law. Through it and the exclusive dealing provision Penn Water has been made to surrender to Consolidated its initiative over rates and services and managerial controls over important phases of its business. These provisions make the arrangement *ultra vires* Penn Water, as the Fourth Circuit held.

Consequently, the claim of FPC counsel regarding the exceptions in the October 1949 order is not only fanciful but is also immaterial.

II. The FPC based important determinations in its orders on the assumed continuance of the illegal private contractual obligations.

If, as we contend, the FPC orders were based on assumed continuance of private contractual obligations and entitlements, and such obligations and entitlements did not exist, the orders were without foundation and must fall. There is here no question of finding statutory authority. There can be no statutory authority to issue orders on false foundations, whether on private contracts illegal under the antitrust laws, or state law, or on any other type of non-existent foundation.

Therefore, in this branch of the case it remains only to make plain that the orders are based on the assumed continuance of the private contractual obligations and not simply on operations. Three important determinations in the orders were so based:

(a) **Rate of return.** The FPC opinions plainly state that the low rate of 5¼% (reduced even further to about 4¾% by the October 27, 1949 order) was fixed because the contract assured Penn Water of "stabilized income" and the Court below held that thereby Penn Water was "insulated" from "any substantial risk" by the contract (FPC Br., p.

77). FPC counsel now say that the unilateral arrangement prescribed by the FPC provides the same "stabilized income" during whatever period the rates "are operative, be it a month, a year, or a decade". There is clearly no stability in such an arrangement.

Consolidated may decide to stop taking and paying for power under the unilateral arrangement at any time. The FPC issued no order requiring Consolidated to continue. Thus, as pointed out in our main brief (p. 53), this may occur after a period of high flow in the Susquehanna River when a large amount of power had been generated and delivered, leaving Penn Water to sell the relatively small amount of power coming from the river in low flow as best it can and thus receive much less than the allowed return. This is certainly not a "stabilized income".

The statement of FPC counsel (Br., p. 109) that the FPC was regulating the sale of the product of this so-called integrated, interstate system, some generated in Maryland and some in Pennsylvania, is erroneous. No investigation was made of Consolidated's rates and charges for its contribution; the only orders issued were against Penn Water.

There is simply no escape from the fact that the substitution of the Commission-prescribed unilateral arrangement will not provide for the same "stabilization of income".

(b) **Jurisdiction of the FPC over Penn Water's Pennsylvania business.** Here, again, FPC counsel claim the jurisdictional determination of the order as to Penn Water's Pennsylvania business is not based on the invalidated contracts (Br., pp. 75-6).

FPC counsel ignore the point made in our main brief (pp. 54-5) that one of the express bases for this jurisdiction was the purchase by Penn Water from Consolidated of energy generated by Consolidated in Maryland and brought across the state line into Pennsylvania for resale to the Pennsylvania utilities, along with power generated by Penn Water in Pennsylvania. This purchase was required by the illegal exclusive dealing provision of the contract.

Once Penn Water is free from this contractual compulsion vested in Consolidated to compel Penn Water to purchase this power from Consolidated, this basis of the jurisdictional determination disappears. Realizing that this is so, FPC counsel have refrained from making the claim (made about other illegalities), that the illegal exclusive dealing provision has been excepted from the contractual provisions directed to be continued.

The other basis of this jurisdictional determination found in the FPC order is that the facilities of Penn Water are, under the Baltimore contract, operated by Consolidated from Maryland, along with the facilities of Safe Harbor and of Consolidated itself, and that the three groups of facilities by reason of this contractual arrangement constitute one system which lies across state lines. Here again, once Penn Water is free of this operational direction from Maryland, there is no more basis for claiming that its facilities are part of one system along with those of Consolidated, than that its facilities are part of one system along with the facilities of any of the utilities with which it is connected in Pennsylvania—Metropolitan Edison (ME), Pennsylvania Power and Light (PP&L), or Philadelphia Electric (PE). This is so, because there is no physical, engineering or electrical difference between these connections, and without the arrangement of control by Consolidated, Penn Water can no more be said to be in a power pool with Consolidated than in a power pool with ME or PP&L or PE.

To have an effective power pool there is no need for the continuance of the arrangement under Consolidated control. The Pennsylvania customers, ME, PP&L and PE are interconnected and exchange energy and have an effective power pool as do other utilities throughout the country under unit rate arrangements customary in the industry without managerial controls by any one company over another.

The conclusion is inescapable that, absent the arrangement of control by Consolidated, there is no basis whatever for FPC jurisdiction over Penn Water's sale of electrical

energy generated in Pennsylvania and sold to Pennsylvania utilities for use in Pennsylvania.

(c) **Allocation of the rate reduction.** We showed in our main brief (pp. 55-57) how the FPC had awarded the major portion, 89%, of the rate reduction to Consolidated as against 11% to Penn Water's Pennsylvania customers.* We there showed that the allocation was not based on service actually being rendered, but on the alleged artificial entitlements of Consolidated and the alleged artificial obligations of Penn Water and Safe Harbor under both the Baltimore and Safe Harbor contracts.

The entitlements and obligations referred to are the alleged entitlements of Consolidated to receive, and the alleged obligations of Penn Water to furnish, all of Penn Water's power remaining after Penn Water's firm commitments to its Pennsylvania customers are fulfilled and Consolidated's alleged entitlement to receive, and Safe Harbor's alleged obligation to furnish, two-thirds of Safe Harbor's power. But absent the contracts, Consolidated has no entitlement to power generated by Penn Water which is not delivered to Consolidated for use in Consolidated's system. Similarly, absent the Safe Harbor contract, Consolidated has no artificial entitlement to Safe Harbor's power which is not delivered to Consolidated for use in Consolidated's system.

FPC counsel admit (Br., p. 81) that the allocation of the reduction "actually did follow that provided by the contracts."

Consequently, since the private contractual obligations and entitlements are concededly void, the two bases on which the FPC allocated the rate reduction are non-existent and the allocation must fall.

We should add that FPC counsel discuss this matter as if Consolidated would somehow be unfairly dealt with by

* There is nothing to the assertion by the respondents that the Pennsylvania customers have not intervened to complain, since the Pennsylvania Public Utility Commission has intervened and is representing their interests in this case and is making this complaint.

an allocation of a rate reduction based on actual service, but they give no reason for their assertions. On the other hand, they ignore the incongruous effect of the allocations in the FPC order which, as pointed out in our main brief (p. 10), would have resulted in a net credit to Consolidated of $616,000 for the test year 1946. Although in that year Consolidated received a substantial amount of electric service from Penn Water, Consolidated would not only have not paid for such electric service, but would have received a cash bonus—all at the expense of Penn Water and its Pennsylvania utility customers.

These three important determinations contained in the FPC orders must fall, regardless of whether the FPC has any authority under the Federal Power Act to continue arrangements illegal under the antitrust laws. They are founded on erroneous assumptions. They are founded on private contractual obligations and entitlements which have been adjudicated among all the parties thereto to be invalid and non-existent. This would be so irrespective of the legal reason for the invalidation of the contracts. It is immaterial in this branch of the case that one of the legal reasons was the antitrust laws. The same result would have to be reached if the Fourth Circuit had held, for example, that the Baltimore contract no longer existed because of its termination for breach, by Penn Water's written notice of December 21, 1948, which not only declared the contract void for illegalities, but also terminated it on account of material breaches by Consolidated. The Fourth Circuit did not have to decide this matter of breach because it found the Baltimore contract void *ab initio* (R., Vol. 18, p. 5349).

III. FPC counsel fail to explain how Part II of the Act can be applicable to licensees under Part I.

The essential dilemma in trying to argue, as FPC counsel do, that Part II of the Act is applicable to licensees under Part I, such as Penn Water, is the clear inconsistency of the regulatory systems of the two Parts. Under Part I interstate rates and services of licensees are subject to regulation by the states involved, unless they are unable to agree, and then by the FPC; under Part II regulation in all cases is by the FPC. The Act is silent, if both Parts are applicable to a licensee, as to which regulatory system shall govern. This point alone should show that Congress did not intend both parts of the Act to be applicable to licensees.

To meet this dilemma FPC counsel argue that Section 20 of Part I does not mean what it says, that the states do not now have the power to regulate by agreement the interstate wholesale rates and services of licensees thereunder and that Congress enacted Part II in 1935 on that assumption. FPC counsel concede in their brief (p. 127) that the "sponsors of the Act" (the Federal Water Power Act of 1920) "believed that the power of the States was not limited to interstate retail rates." Moreover, when Congress enacted Part II in 1935, it simultaneously reenacted the Federal Water Power Act as Part I of the Federal Power Act, *without changing the language of Section 20,* an astounding performance if what FPC counsel states were correct. FPC counsel say that Congress made this new assumption in 1935 despite the express words of the section to the contrary.

FPC counsel state that Congress made this assumption because of this Court's decision in the *Attleboro* case, 273 U. S. 83 (1927). But this is unsound. The *Attleboro* case simply decided that one state could not regulate the interstate wholesale rates of an ordinary public utility, but had nothing to do with regulation of interstate wholesale rates by two states under compact powers expressly given

to them in Section 20 of the Federal Water Power Act (now Part I of the Federal Power Act) by Congress.

FPC counsel fail to discuss the decision of the Third Circuit in the first *Safe Harbor* rate case, 124 F. 2d 800 (1941), cert. den. 316 U. S. 663 (1942), which is the only applicable and controlling decision on the question. The basic holding of this case was that the States of Maryland and Pennsylvania had the right to regulate the interstate wholesale rates of Safe Harbor under Section 20 of Part I, and possessed the constitutional power to do so.*

We should add that the dilemma regarding dual regulation was not solved by the Third Circuit in the second *Safe Harbor* rate case, 179 F. 2d 179 (1949), cert. den. 339 U. S. 957, relied on by FPC counsel, as explained in our main brief (pp. 78-79).

The dilemma is insoluble and prevents any sound determination that Part II is applicable to licensees under Part I.**

The dilemma can only be avoided by adopting the simple construction indicated by the wording and structure of the Act—that Part I is applicable to licensees, Part II to public utilities in interstate commerce other than licensees, and Part III to both.

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* The cases cited by the FPC in its brief (p. 125) are inapplicable since they, like the *Attleboro* case, involved no question of the power of two states to regulate under compact, and none of them even considered Section 20 of the Federal Power Act.

** FPC counsel also fail to show that the rate base defined for licensees under Part I is the same as the discretionary rate base determined by the FPC under Part II, for the reason they give is a *non sequitur*. They merely say that because the *rates* to be established as provided in Part I are just and reasonable rates and the *rates* to be established under Part II are also just and reasonable rates, the *rate base* must therefore be the same.

FPC counsel avoid any discussion of the plain fact that Section 3(13) of Part I of the Act provides expressly that net investment (rate base) shall be that provided for in "Classification of Investment in Road and Equipment of Steam Roads, Issue of 1914, Interstate Commerce Commission", and that under that classification concededly no deduction from investment accounts is made on account of depreciation until property is retired.

That simple construction of the Act would also, as Congress intended, give licensees of the Federal Government the rights to which they are entitled to match the severe duties and obligations imposed on them, described in our main brief (pp. 83, 84), to which ordinary public utilities are not subject.

IV. Miscellaneous contentions and incorrect statements of the Respondents.

The briefs of the FPC and the intervenors make a number of contentions and incorrect statements regarding matters which are either irrelevant or of no great significance. There is no necessity to deal with these in detail but certain of them will be briefly disposed of. We do not deal at all with intervenors' statements arguing as to the validity or invalidity of the Baltimore and Safe Harbor contracts, since those matters stand as *res judicata*.*

A. FPC Brief.

1. **Penn Water is not Dependent on Consolidated's Steam Generation.** It is claimed that Penn Water must have Consolidated's steam generated electricity and is thus dependent on Consolidated (FPC Br., pp. 13, 45). The claim is baseless. The three Pennsylvania utilities with which Penn Water is connected all have large steam electric generating capacities and serve the same type of customers as Consolidated. If Penn Water needs supplemental steam generated electricity, it would be free to obtain it from these other utilities. Penn Water has been required to purchase supplemental electricity from Consolidated because of the illegal exclusive dealing provision of the Baltimore contract.

Penn Water at the present time has hydro-generated power and a small amount of steam-generated power for

* Since the FPC orders are founded on both the Baltimore and Safe Harbor contracts, the adjudicated invalidity of the Baltimore contract is sufficient basis regardless of the Safe Harbor contract for setting aside such orders.

sale to other utilities. This electricity can be sold by Penn Water at less than it costs these neighboring utilities to generate their own power and is readily saleable to them when, and in the quantities, available. If Penn Water has necessity, as FPC counsel assert, for "firming up" its hydro-generated electricity with steam-generated electricity, it could purchase from any connected utility in the absence of the illegal exclusive dealing provision of the FPC orders.

2. **Feasibility of Unit Rates.** FPC counsel assert (Br., p. 47) that there are too many uncontrollable variables to permit the unit rate basis for Penn Water's tariffs. There is obviously nothing to this. No one knows in advance how much power any utility is going to sell during a given period of time and rates established as reasonable by a regulatory body are not guaranteed by that body. As pointed out in our main brief (pp. 66, 67), the unit rate in the words of the Civil Aeronautics Board preserves "incentive toward the accomplishment of decreased costs and increased revenue" and, in the words of this Court, forces utilities "within a given class to compete in securing revenues and in reducing or controlling costs". *TWA* v. *CAB*, 336 U. S. 601, 606-7 (1949).

Penn Water's contracts with the Pennsylvania utilities are on the usual unit rate basis. The specified return method of payment is virtually unheard of in the industry except in the case of a parent and a wholly-owned subsidiary, where the subsidiary is an incorporated "vest pocket" of the parent and the contract is a mere matter of bookkeeping.*

3. **Alleged Concessions by Penn Water.** FPC counsel make unsupported assertions that petitioners have made numerous concessions regarding the FPC rate orders. We wish to inform the Court that no such concessions have been made. Petitioners do not concede, for example, that

* The Conowingo contract mentioned by intervenors was made in such a situation. This contract did not contain any managerial controls by the purchaser over the seller.

the FPC orders were authorized by or conform to the standards of the Federal Power Act (FPC Br., pp. 29, 38, 39, 60); or that the orders are supported by substantial evidence, or that the rate reduction was not excessive (FPC Br., pp. 36, 79).

There is no concession, as stated by FPC counsel (Br., p. 40 fn. 30) that Penn Water's sales to Consolidated are subject to the Commission's jurisdiction. We concede that such sales are in interstate commerce and subject to whatever regulatory system Congress has provided, but we contend that such system is regulation under Section 20 of Part I by the states if they can agree and, only if they cannot agree, by the FPC.

4. **Suggestion of Application by Penn Water to FPC for Relief from Restraints Ordered by It.** The contention is made that privately exercised restraints, such as Consolidated's control over Penn Water's expansion of facilities, are valid because Penn Water can apply to the FPC to have them lifted. That the FPC might change an illegal restraint does not make it valid while in force.

As pointed out above, by giving these restraints over Penn Water to Consolidated, and then claiming that a violation of the restraints would be a violation of an order of the FPC, FPC counsel are seeking to obtain for the FPC a power over non-project facilities which it does not have under the Act.

The whole idea that the FPC has power to, or will, police the performance of the arrangement in the public interest is specious. The FPC did not even so much as express concern over Consolidated's action in prohibiting Penn Water from building its new steam plant. On the contrary, the FPC in its order of February 28, 1949 subsequently praised the very contract provision under which that action had been taken. The FPC did nothing about Consolidated withholding over $900,000 (up to December 1948) from Penn Water. In fact, it expressly refused to take any action (R. Vol. 16, p. 4960).

Also, the FPC refused to investigate Consolidated's rates and charges for the power it sold to Penn Water and issued orders only against Penn Water, notwithstanding that such rates and charges were for interstate wholesale rates and regulatable to the same extent Penn Water's rates and charges were regulatable, and notwithstanding that Penn Water had requested such regulation.

5. **Incorrect Statement as to Penn Water's Retail Rights.** It is claimed in the FPC brief (p. 7) that Penn Water has no retail "franchise service area". This flies directly in the face of the decision of the Fourth Circuit, which is binding on all the necessary parties, including the Maryland and Pennsylvania Commissions, that Penn Water itself has charter rights to sell power at retail in Pennsylvania, and that its wholly-owned subsidiary, Susquehanna Transmission Company of Maryland, has charter rights to sell electricity at retail in Maryland (R., Vol. 18, p. 5326).

At the present time, Penn Water does not have any retail distribution system. However, as the Fourth Circuit found, Penn Water sold electricity to the street railway company in Baltimore up until the time during the period of Aldred control when the business was taken away from Penn Water and given to Consolidated (R., Vol. 18, pp. 5325, 5329).

Neither the FPC nor the intervenors question that both Consolidated and Penn Water have the right to and do sell at wholesale.

6. **References to Statements of Penn Water Officers.** FPC counsel point to testimony of officers of Penn Water and annual reports of Penn Water praising the contractual arrangement. They fail to state, however, that such statements were made at a time before Consolidated had used the controls of the agreement, culminating in Consolidated's use of its controls to prevent Penn Water from building its new steam generating plant. They also fail to state that the reports referred to were issued in the period of Aldred control, from 1910 at least through 1946.

7. **Alleged Failure to Challenge FPC Order of October 27, 1949.** The claim is made (FPC Br., p. 22 fn. 21) that Penn Water has not challenged the reduction of its rate of return from 5¼% to about 4¾% by the FPC order of October 27, 1949. We cannot understand this because Penn Water separately petitioned for review of the whole October order (R. Vol. 17, p. 1), argued the matter before the District of Columbia Circuit and listed affirmance of the order in its petition for certiorari (p. 1) and its main brief herein (p. 20) as among the errors to be urged.

8. **Alleged Resemblance to Cost-Plus Contract.** FPC counsel assert (Br., p. 93) that the illegal revenue pooling arrangement is like a cost-plus contract and that cost-plus contracts are not *ultra vires*. There is faint resemblance between the payment arrangement present here and an ordinary cost-plus contract although each have the same vice of removing incentive, the cost-plus contract to a much lesser degree.

Usually, cost-plus contracts are not made between competitors, and do not relate to the entire business of one of the contracting parties. Under an ordinary cost-plus arrangement there is no managerial control by a purchaser over a seller and the seller is free to do as much business as it pleases with others. A cost-plus contract covering the entire business of a company made with a competitor would be illegal, just as the payment provision here is illegal, since both remove incentive and eliminate competition.

No cost-plus arrangement would ever result in the purchaser receiving the commodity plus a cash bonus as the present arrangement would have resulted in the test year 1946, as previously pointed out. Also, under a cost-plus contract, the return is not fixed without any relation to the amount of the commodity furnished, as it is in this case.

B. Intervenors' Briefs.

1. **Suggested Initiation of New Rate Case.** Intervenors' counsel contend that Penn Water must file a new tariff and

have a new proceeding before the FPC and the courts in order to obtain relief from this restrictive arrangement.

There is nothing to this. The issues are before this Court in this proceeding. If Penn Water had abandoned review of the present orders and filed a new arrangement with the FPC, the FPC would undoubtedly have contended that this case was a precedent for its authority to impose the contractual arrangements.

In fact, Penn Water did file a new arrangement, February 6, 1951, at the earliest possible moment it could legally do so. This was immediately after the District Court on January 17, 1951, pursuant to the mandate of the Fourth Circuit, dissolved the preliminary injunction obtained by Consolidated requiring Penn Water to perform both the Baltimore and Safe Harbor contracts. But the FPC rejected this new tariff on the ground, among others, that to be permitted to file new schedules Penn Water "must recognize" the existing FPC orders. Thus, the FPC sought to put Penn Water in a position of barring itself from continuing to appeal from such orders.

This argument of intervenors' counsel is simply an attempt by them to avoid decision of the real issues, notwithstanding the years of litigation and expense which have been incurred by all parties to get such issues before this Court.

2. **Misstatement as to Penn Water's Intent Regarding Interstate Operations.** There is no attempt here, as intervenors contend, on the part of Penn Water to stop selling power to Consolidated and thereby withdraw from interstate commerce. Penn Water has repeatedly declared its readiness to continue to furnish power to Consolidated and thereby to subject itself to whatever regulatory system Congress has imposed on such sales. Penn Water does, however, contend that its Pennsylvania sales of power generated in Pennsylvania are not in interstate commerce but are subject to the regulation of the Pennsylvania Commission.

3. **Misstatement as to Safe Harbor's Status.** Intervenors repeatedly refer to Safe Harbor as being wholly-owned by Penn Water and Consolidated or as being jointly owned by them. Neither statement is correct. Safe Harbor is not a wholly-owned subsidiary of either Penn Water or Consolidated, nor do Penn Water and Consolidated own its stock jointly; each owns separately one-half of the voting stock of Safe Harbor. The stock is in no way tied to the power contract and is free for sale to anyone at any time. Thus all or any part of the voting stock may at any time come into the ownership of someone having no relation whatever to the power contract.

4. **Misinterpretation of Passage in Second Fourth Circuit Decision.** Intervenors say that in the Safe Harbor contract case the Fourth Circuit said that the FPC had not prescribed the provisions of the contract, including the illegal provisions, as if that meant that the Fourth Circuit had said that the FPC had not approved all the provisions. What the Fourth Circuit was doing at this point in its opinion was answering a minor controversy brought about by a statement in Penn Water's brief in the case as to whether the FPC had originated the provisions or whether the FPC had simply approved provisions which it found in the agreement and which were originated by John E. Aldred and associates.* The Fourth Circuit said that the latter

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*Penn Water Brief in answer to Brief of the FPC, p. 17: "The plain fact is, as shown by the FPC opinion and order of 1946 in the *Safe Harbor* case (Tr. 477-568), that the FPC did not itself prescribe the provisions of the Safe Harbor contract. As this Court found in the prior case (Op. 7, 9, 10), the Safe Harbor contract was drafted in 1931 while the parties were under the control of J. E. Aldred and associates. The contract was required to be filed with the FPC by general order of the FPC issued under the Federal Power Act. All that the FPC in its opinion and order in the *Safe Harbor* rate case did, was to change the rate, that is, the amount to be charged by Safe Harbor for its electricity. The FPC simply assumed the contract provisions. The opinion and order in the rate case are devoid of language appraising or evaluating the beneficial or detrimental effects of the contract provisions. There was no issue before the FPC in the *Safe Harbor* rate case as to any such matter."

was the case. This portion of the opinion is only a statement of the case, not a basis of decision, since the Fourth Circuit clearly held that the FPC had no authority under the Federal Power Act to exempt the contract from the antitrust laws and that the courts were not ousted from jurisdiction to determine antitrust law questions.

5. **Statement as to Continuance of Services.** Intervenors say that the contractual arrangements have been performed right along, even since Penn Water's claim of invalidity in December, 1948. But Penn Water was under court injunction, obtained by Consolidated, to perform both the Baltimore and Safe Harbor contracts until dissolution of the injunction January 17, 1951. Thereafter, on February 6, 1951 petitioners tried to file with the FPC rate schedules for new arrangements with Consolidated, but the rate schedules were rejected by the FPC. Penn Water then had to await the decision of the D. C. Circuit and now of this Court before taking further action.

6. **Statement Regarding Allocations.** Intervenors state that allocation of a rate reduction is a matter of fact to be determined at the administrative level. But this is clearly not so when the reduction being allocated, as well as the allocation, is expressly based on a non-existent foundation, as is the case here. Moreover the courts clearly have power to review and set aside plainly erroneous calculations and allocations.

7. **Statement Regarding Dissenting Opinion Below.** Intervenors say that the dissenting opinion below recognized the validity of the payment provision of the Baltimore contract. This is incorrect. The opinion clearly recognized that the Fourth Circuit invalidated the entire contract (R. Vol. 18, pp. 5409-12).

8. **Statement Regarding Motions to Set Aside.** Intervenors seem to intimate that petitioners did not call the Fourth Circuit's Safe Harbor contract decision to the

attention of the D. C. Circuit. On the contrary, just as soon as the District Court decided the Safe Harbor contract was invalid, petitioners moved to bring that decision before the D. C. Circuit and also presented the decision to the D. C. Circuit later in a motion for rehearing and that decision is part of the record in this case (R. Vol. 18, p. 5361).

9. **Statement as to Relief.** Intervenors contend that Penn Water has changed from time to time the relief it asked for in this case. There is nothing to this. Penn Water has always asked for the equitable relief the situation calls for. The words used may have varied but their import was the same. All the prayers for relief in the petitions for review and the motions in the D. C. Circuit ask for such relief as may be just in the premises.

The orders of the FPC are illegal and should be set aside and Penn Water should be permitted to file with the appropriate regulatory authorities new arrangements not incorporating the illegal contractual features. The moneys segregated under the D. C. Circuit stay order and FPC stay order are in the jurisdiction of the Courts and should be dealt with by them in an equitable manner.

Conclusion.

It is respectfully submitted that the judgment and orders of the D. C. Circuit should be in all respects reversed and the D. C. Circuit should be directed to grant petitioners' motions to set aside the orders of the FPC.

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April 1, 1952.

Appendix I

GENERAL REGULATORY POWERS OF FEDERAL COMMISSIONS AND STATUTES CONTAINING ALSO SPECIFIC PROVISION FOR LIMITED INAPPLICABILITY OF THE ANTITRUST LAWS

1	2	Matter Subject to Regulation					Matter Subject to Regulatory Supervision and Determination						
		3	4	5	6	7	7	8	9	10	11	12	13
Industry	Regulatory Statute	Rates, Regulations, Contracts, etc.	Divisions of Rates	Discriminatory Practices	Service	Compulsory Interconnections Through Service	Compulsory Interconnections, Through Service	Pooling of Revenues	Acquisition of Control	Mergers and Consolidations	Issue of Securities	Extensions or Abandonments	Rate Associations
Railroad	Interstate Commerce Act, Part I (49 U. S. C. §§1-27)	§§1(5), 15(1)	§§1(4), 15(6)	§§3(1), 15(1)	§§1(4), 1(10)-1(17), 1(21)	§§1(4), 3(4), 15(3)	§§1(4), 3(4), 15(3)	§5(1)	§5(2) *et seq.*	§5(2) *et seq.*	§20a	§§1(18)-(21), 5(2)(a)(ii)*	§5b
Motor Carrier	Interstate Commerce Act, Part II (49 U. S. C. §§301-327; §§5, 5b)	§316(a), (b), (c), (e), (g)	§316(a), (e), (f)	§316(d)	§§304(a)(1), (3), 316(b)*	§316(a), (e)	§316(a), (e)	§5(1)	§5(2) *et seq.*	§5(2) *et seq.*	§314	§§306-312	§5b
Water Carrier	Interstate Commerce Act, Part III (49 U. S. C. §§901-923; §§5, 5b)	§§905(a), 907(b)	§907(d)*, (e)*	§§905(e), (d), 907(b)	§905(a), (b), (d)	§§905(b)*, 907(d)*	§§905(b)*, 907(d)*	§5(1)	§5(2) *et seq.*	§5(2) *et seq.*		§§909-912*	§5b
	(Also, Shipping Act, 46 U. S. C. §§801-842)			§§812-816				§814					§814
Freight Forwarders	Interstate Commerce Act, Part IV (49 U. S. C. §§1001-1022)	§§1004(a), 1006(b), 1015		§§1004(b), (d), 1006(b)	§1004(a)				§1011			§§1010, 1011(b)	§5b
Aeronautics	Civil Aeronautics Act (49 U. S. C. §§401-705)	§§484(a), 642(d), 642(i)	§§484(a), 642(h)	§§484(b), 642(f)	§§484(a), 551 *et seq.*	§642(i)	§642(i)	§492	§§488, 489, 493	§§488, 493		§481	§492
Telephone	Federal Communications Act (47 U. S. C. §§151-609)	§§201(b), 205	§201(a)*	§§202, 205	§§201(a)*, 214(d)*, 215*	§§201(a)*, 214(d)*	§§201(a)*, 214(d)*		§221	§221		§214*	
Telegraph	Federal Communications Act (47 U. S. C. §§151-609)	§§201(b), 205	§201(a)	§§202, 205	§§201(a), 214(d), 215	§§201(a), 21	§§201(a), 214(d)		§222	§222		§214	

NOTES: (1) All but starred (*) items were contained in substantially the present form in regulatory statute prior to, or were enacted concurrently with, first enactment of specific antitrust exception provision.

(2) **Bold type** section numbers indicate Commission action covered by specific antitrust exception provision.

IN THE

Supreme Court of the United States

October Term, 1951

No. 429

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioner

v.

FEDERAL POWER COMMISSION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

INDEX

TABLE OF CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Pennsylvania Public Utility Commission, prays that your Honorable Court issue a writ of certiorari to review the judgment and orders of the United States Court of Appeals for the District of Columbia Circuit (herein-

after called D. C. Circuit) entered in the above case on July 3 and 6, and September 6, 1951, (Printed Record Vol. 18 pp. 73, 74, and p. 78) denying motions to annul or remand and affirming orders of the Federal Power Commission. The judgment and orders were entered by a divided court and in direct conflict with the unanimous decision of the United States Court of Appeals for the Fourth Circuit from which this Court denied certiorari[1], and the decision of the United States District Court for Maryland,[2] declaring illegal certain contracts and holding in effect that FPC had no authority to validate them by the orders here involved. These contracts so declared illegal are the basis for the orders of FPC and terms thereof are required by said orders to be continued in effect.

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[1] **Pennsylvania Water & Power Company et al. v. Consolidated Gas Electric Light Power Company of Baltimore et al.**, 184 F. 2d 552 (1950), cert. den. 340 U. S. 906 (1950), 186 F. 2d 934 (1951).

[2] **Pennsylvania Water & Power Co. et al. v. Consolidated Gas Electric Light & Power Co. et al.**, 97 F. Supp. 952 (1951).

OPINIONS AND ORDERS BELOW

The opinion and order of FPC dated January 5, 1949, the opinion and order of February 28, 1949, and opinion and order of October 27, 1949, are found at R. Vol. 16 pp. 39-191; Vol. 16 pp. 372-388; Vol. 17 pp. 46-71; the majority opinion of the D. C. Circuit (R. Vol. 18 pp. 46-72) per Bazelon, Circuit Judge, in which Fahy, Circuit Judge, joined is not yet officially reported. The dissenting opinion of Wilbur K. Miller, Circuit Judge, was filed on October 4, 1951. The order denying rehearing, to which Judge Miller also dissented, is found at R. Vol. 18, pp. 78.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code (62 Stat. 928, 28 U.S.C. §1254) and Section 313(b) of the Federal Power Act (49 Stat. 860, 16 U.S.C. §825 l).[3]

STATUTES INVOLVED

The statutes of the Commonwealth of Pennsylvania involved are set forth in Appendix A.

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[3] The judgment of the D. C. Circuit was entered on July 3, 1951. Petitioner's motion for rehearing was denied September 6, 1951, (R. Vol. 18 pp. 73-74). Application for a stay of certification to the FPC of the opinion and judgment (in lieu of mandate) of the D. C. Circuit pending application to this Court for a writ of certiorari and final disposition of the cases was duly made, and the orders granting and extending the stay were entered September 17, 1951, and October 15, 1951, respectively.

STATEMENT

FPC orders, which the D. C. Circuit affirmed, were issued in proceedings to determine the reasonableness of rates charged for the energy supplied by Pennsylvania Water and Power Company and Susquehanna Transmission Company of Maryland to Consolidated Gas, Electric Light & Power Company of Baltimore, Pennsylvania Power and Light Company, Philadelphia Electric Company and Metropolitan Edison Company. The latter three electric companies are located in Pennsylvania. These orders required a reduction in rates as well as continuance of substantive provisions of a contract between Penn Water and Consolidated.[4] The amount and allocation of the reduction were based upon said contract. Determination of FPC jurisdiction over Penn Water's wholesale sales in Pennsylvania and the allocation of the reduction between Consolidated and the Pennsylvania customers of

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[4] The Baltimore contract consisted of three agreements dated December 31, 1927, June 1, 1931 and September 29, 1939 between Penn Water and Consolidated (R. Vol. 15, pp. 4577-4603; 4606-4621).

Penn Water were predicated upon the assumed existence and continuance of such contract. A further contract between Penn Water, Consolidated and Safe Harbor Water Power Corporation[5] was likewise the basis for important features of the order. FPC designated these contracts "the foundation contracts" of its orders. These contracts were adjudicated by the unanimous decision of the United States Court of Appeals for the Fourth Circuit and by the United States District Court for Maryland to be illegal and void **ab initio** in their entirety, as being in violation of the laws of Pennsylvania governing public utilities as well as Federal antitrust laws and public policy.

Litigation was begun in the Fourth Circuit prior to the first FPC order involved (January 5, 1949) and was formally brought to the attention of FPC by petitions for rehearing. FPC, however, held that the illegality of the contracts was immaterial to its orders. The decision of the Fourth Circuit (R. Vol. 18, pp. 1-28) was

[5] The Safe Harbor contract consisted of three agreements dated June 1, 1931, August 1, 1932 and November 22, 1939 between Safe Harbor, Consolidated and Penn Water (R. Vol. 15, pp. 4554-4576). In the case of each contract the basic agreement was the one dated June 1, 1931.

rendered and certiorari denied by your Honorable Court while review of the FPC orders by the D. C. Circuit Court was pending. The decision was brought to the attention of that Court by formal motions.

The Fourth Circuit held that the interchange of electricity should be by some method which "will not infringe either the [Federal] antitrust laws or the utility laws of Pennsylvania". The D. C. Circuit held, in effect, that "anti-trust criteria" do not apply to orders of the FPC and that the FPC could order continuance of what would otherwise be an illegal contractual arrangement and could base important features of its orders thereon. The D. C. Circuit did not discuss the adjudicated invalidity of the contracts under the Pennsylvania Public Utility Law and public policy.

The D. C. Circuit decision permits and, for the first time, enables FPC to dictate complete terms and conditions by and under which public utilities subject to its jurisdiction may operate. Further, FPC may now dictate the terms of any contract between public utilities and may dictate all intercorporate relations, notwithstanding the opposition of management of any or all of the utilities involved, or the legality thereof under federal or state laws.

The effect of its decision was to hold such invalidity wholly immaterial and to permit the FPC to incorporate into its rate orders provisions which destroy initiative in establishing reasonable rates and services although such initiative was required to be preserved under the Pennsylvania Public Service Company law (in effect when the Baltimore contract was made) and the Pennsylvania Public Utility Law, which is now in effect, and although the D. C. Circuit Court itself concedes (R. Vol. 18, p. 53) that the preservation of such initiative is a "condition precedent to proper operation of the rate making process."

The decision of the D. C. majority is not only in direct conflict on questions of Federal law of great importance with the unanimous decision of the Fourth Circuit and other courts, but the conflicting decisions relate to the identical contracts. The decision of the Fourth Circuit will have been rendered ineffective by the decision of the D. C. Circuit majority if this petition is not granted by Your Honorable Court.

Determination by Your Honorable Court of the validity or illegality of the contracts involved is of vital importance to your petitioner and the Commonwealth of Pennsylvania, as well as to the public utility commissions and the respective

states throughout the United States of America. The holding of the D. C. Circuit, affirming the action of FPC assuming jurisdiction of wholesale sales of electric energy within a state of energy produced within that state, is so inextricably based upon the contracts declared by the Fourth Circuit to be illegal and void **ab initio** that if FPC is denied the power to enforce the illegal contracts under the guise of rate orders, the basis for its finding and conclusion that the sales are in interstate commerce will have been removed.

THE PARTIES INVOLVED AND THEIR INTERESTS AND BUSINESSES.

Pennsylvania Public Utility Commission, your petitioner, is the administrative agency within the Commonwealth of Pennsylvania to which has been delegated the power and upon which has been conferred the duties of enforcing the public utility laws and of regulating rates and services of public utilities engaged in intrastate commerce.

Penn Water and Safe Harbor are Pennsylvania electric utility corporations subject to the jurisdiction of your petitioner. Both corporations own hydroelectric generating plants on the Susquehanna River. Penn Water also owns a steam generating plant and transmission lines in Pennsylvania, and, through its wholly owned subsidiary, transmission lines in Maryland. The present business of such companies is the sale of electric energy at wholesale and in bulk.

Penn Water's wholesale customers include PE, PP&L and ME. These are Pennsylvania electric utilities, having steam electric generat-

ing plants and transmission and distribution facilities in Pennsylvania, and sell both at wholesale and at retail. They are also subject to the jurisdiction of your Petitioner, Pennsylvania Public Utility Commission.

Consolidated is a Maryland electric utility corporation with steam electric generating, transmission and distribution facilities in and around the City of Baltimore, Maryland. Consolidated has generating capacity several times that of Penn Water or Safe Harbor and is in the business of selling electric energy at wholesale and in bulk as well as at retail.

THE CONTRACTS

The invalidated Penn Water, Baltimore and Safe Harbor contracts, which would have remained in effect until 1980, provided for payments by Consolidated for power, not on a unit rate basis, but on a basis which would provide to the seller recovery of operating expenses including taxes and a specified return on investment, regardless of the amount of power delivered or extent of services rendered, with a credit to Consolidated for revenues received from sales of power to others. This arrangement is in clear violation of the Pennsylvania Public Utility Law which requires utilities to establish and maintain reasonable rates and furnish adequate service. The obvious purpose and effect of the arrangements in issue are to remove incentive to compete, to expand or to effect operating economies. The contracts contain closely associated provisions providing for control by Consolidated over the contracts, sales, purchases, prices, output and expansion of both Penn Water and Safe Harbor which are also illegal under Pennsylvania law, public policy and the antitrust laws, and were **specifically** alluded to as being illegal

under such laws by the decisions of the Fourth Circuit and the District Court for Maryland.

The contracts surrender control of Penn Water and Safe Harbor to Consolidated, stifle their initiative with respect to rates and services and virtually destroy the independent corporate character of these Pennsylvania corporations. The provisions of the contracts have been used by Consolidated to interfere with Penn Water's and Safe Harbor's contracts with their Pennsylvania customers[6] and to prohibit Penn Water from building a new large steam electric generating plant in 1948 from which badly needed power could have been economically produced.

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[6] PP&L, PE and ME. The contracts with these customers are all on the customary unit rate basis, i. e., payment based on amount of power delivered and without managerial control and restraints by the purchaser over the seller.

PROVISIONS OF THE FPC ORDERS

FPC in its opinion denying rehearing (February 28, 1949) held immaterial to its rate orders the possible illegality of the Baltimore and Safe Harbor contracts. It directed continuance of the existing illegal pooling arrangement of the Baltimore contract as follows:

> "The present arrangement whereby sales to Pennsylvania customers are made on a firm basis on definite rate schedules whereas Baltimore Company takes what is left and assures Respondents (Penn Water and Susquehanna Transmission Company) of the recovery of all proper operating expenses, depreciation, taxes and a fair rate, is the most practicable under the circumstances. That arrangement will, therefore, be continued * * *" (R. Vol. 16, p. 379). (Matter in parenthesis added.)[7]

The FPC approved in emphatic terms the restrictive controls of the Baltimore contract, such

[7] A similar directive is contained in the first FPC order (R. Vol. 16 p. 175).

as Article VIII[8] requiring the consent of Consolidated to any action by Penn Water with respect to operating, engineering, or accounting matters (R. Vol. 16, pp. 53-54), Article IV[8] requiring the consent of Consolidated to purchases and sales by Penn Water (R., Vol. 16, p. 380) and Article V[8] requiring the consent of Consolidated to substantial expansions by Penn Water (R. Vol. 16, p. 378). Possibility exists that FPC or Consolidated might, in the future, assert that the FPC orders required continuance of the illegal restrictive provisions of the Baltimore and Safe Harbor contracts, as well as the payment provisions, and that the D. C. Circuit upheld its power to do so. The FPC orders were based upon the assumed existence of the entire contracts, including the restrictive provisions specifically referred to as illegal by the decisions of the Fourth Circuit and the District Court for Maryland. FPC, relying upon Baltimore and Safe Harbor contracts as "foundation contracts", held that certain operations thereunder, the wholesale sales of electric energy by Penn Water to the three Pennsylvania electric utilities, otherwise intrastate, were interstate in character and subject to regulation by it. Actually, these serv-

[8] The entire text of these Articles are set forth at R., Vol. 15, pp. 4612-14.

ices are rendered wholly within the State of Pennsylvania, but the FPC held them interstate on the grounds (R., Vol. 16, pp. 53-55) that Penn Water was part of an integrated system (created by the illegal contracts and continued by FPC direction) and that power purchased from Consolidated was used to supplement the power generated by Penn Water and sold in Pennsylvania (Article IV of the Baltimore contract permitting Consolidated to require that such supplemental power be purchased from it by preventing such purchase from others).

Absence of the illegal provisions of the Baltimore contract, which Consolidated utilized to require Penn Water to purchase supplemental power from Consolidated rather than from Penn Water's Pennsylvania customers, would permit Penn Water to purchase such supplemental power in Pennsylvania and thereby eliminate the need for intermingling of interstate power with that sold by Penn Water to such customers.

FPC held that the sales of electric energy by Penn Water to its Pennsylvania customers constituted sales in interstate commerce. It dismissed, without discussion, argument made by your Petitioner regarding lack of jurisdiction over the sale of energy produced in Pennsylvania and sold to Pennsylvania customers, as well as

the alternative contention that sales to Pennsylvania customers are local in character and the interstate commerce, if any involved, so negligible as to be incidental to the dominant intrastate business and as such not interstate commerce. Instead, it concluded that, by reason of the contractual arrangements, the system was "an integrated and coordinated electric system" (R. Vol. 16, p. 53) and that each of Penn Water's sales in Pennsylvania "is clearly a system transaction of a character wholly interstate even though at times it involves varying amounts of energy never crossing the State boundary, sometimes unmixed and sometimes mixed with out-of-state energy. (R. Vol. 16, p. 55)

FPC allocated the reduction between Consolidated and the three Pennsylvania electric utility customers of Penn Water, giving the major share of the reduction to Consolidated, such allocation being determined on the basis of alleged "entitlements" of Consolidated under the Baltimore and Safe Harbor contracts and not on the basis of the power actually delivered. An allocation on the latter basis would have given the Pennsylvania utilities a much greater share of the rate reduction.

ULTIMATE RELIEF SOUGHT BY PETITIONERS

Pennsylvania Public Utility Commission ultimately seeks to be free from FPC interference as regards enforcement of orders and regulations pertaining to the intrastate rates and services of Penn Water, to the end that the Commission may perform properly the duties imposed upon it and exercise the powers delegated to it by the Pennsylvania Public Utility Law.

Petitioner requests Your Honorable Court to review this case and set aside the orders of the FPC or, in the alternative, to remand the case to FPC with directions (a) that its jurisdiction be limited to determination of the reasonableness of rates for power sold in interstate commerce by Penn Water and Transmission Company to Consolidated, and (b) to determine such rates without regard to the illegal contracts and on a unit rate basis to be determined by the amount of capacity and energy actually supplied and with allocations, if any be made, to be based on costs of energy supplied and services actually rendered and not on fictitious "entitlements".

QUESTIONS PRESENTED

I. Where electric energy is produced in Pennsylvania and thereafter sometimes commingled with electric energy flowing from another state and sold to Pennsylvania customers and where the proportions of such respective energy are ascertainable, are such sales in interstate commerce within the scope and intendment of the Federal Power Act and subject to the jurisdiction of FPC?

II. May FPC compel a Pennsylvania public utility to maintain contractual arrangements, whereby such corporation is disabled from properly performing its duties under the law of the state of its incorporation and surrenders basic rights, powers and privileges inherent in that franchise to a foreign public utility and may FPC premise its findings as regards jurisdiction and other critical provisions of its rate orders upon the existence and continuance of such contractual arrangement?

III. Where contracts which constitute the basis for a jurisdictional finding by FPC of interstate transmission of energy have been de-

cleared illegal as being in violation of the Federal anti-trust laws, the Pennsylvania Public Utility and public policy, may FPC, nevertheless, require continuance of such contractual arrangements in the form of a rate order?

The above stated issues were determined in the affirmative by the D. C. Circuit and such determinations are specified as errors to be urged.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

I. The decision of the D. C. Circuit, holding that where electric energy is produced in Pennsylvania and thereafter commingled with electric energy flowing from another state and sold to Pennsylvania customers and where the respective portions of such energy are ascertainable, is contrary to the decisions of Your Honorable Court in Peoples Gas Company v. Public Service Commission, 270 U. S. 550 (1926) and Lone Star Gas Company v. Texas, 304 U. S. 224 (1938).

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a. The D. C. Circuit Decision Is Contrary To Peoples Gas Co. v. Public Service Commission, 270 U. S. 550 (1926).

The energy produced and sold in Pennsylvania is in intrastate commerce, irrespective of whether mingled with energy of another state. In **Peoples Gas Co. v. Public Service Commission,** 270 U. S. 550, 554-555 (1926) the Gas Com-

pany received two-thirds of its gas from West Virginia and produced the other one-third in Pennsylvania. The gas from both sources was mixed and sold to various customers. Your Honorable Court held that the West Virginia gas was in interstate commerce but that the Pennsylvania gas was in intrastate commerce only. It was said:

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other. Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265; United Fuel Gas Co. v. Hallanan, 257 U.S. 277; 281. And see Hallanan v. Eureka Pipe Line Co., 261 U.S. 393; Hallanan v. United Fuel Gas Co., 261 U.S. 398."

The fact of commingling with electric energy from another state does not affect the true nature of that produced and sold within the state. Par-

ticularly is that true where, as here, a division between purely intrastate energy and energy obtained from Consolidated is entirely practical. While impliedly denying the practicality in one portion of its order, FPC recognized the feasibility and duty of making similar allocations in its order of October 27, 1949 (R. Vol. 17, p. 53). FPC there specified in each of the three schedules of rates to the Pennsylvania customers an identical formula for fuel cost adjustment applicable to the portion of the kilowatt-hours sold as firm energy to Pennsylvania customers which is supplied by the Baltimore Company. The separation of sources of supply which FPC made in this latter matter is the type of allocation it should have made between intrastate and interstate sources of electric energy.

Your Honorable Court has approved FPC allocations where a utility's business consisted of intrastate sales, direct industrial and interstate wholesale:

Colorado Interstate Gas Co. v. Federal Power Commission, 324 U. S. 581 (1945);

Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 324 U. S. 635 (1945).

Recognition of the practicalities of an allocation of source of energy which, on the basis of the instant record, is approximately 83% intrastate and 17% interstate, compels the conclusion that sales involving interstate commerce are negligible and sales in intrastate commerce predominant.

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b. The D. C. Circuit Decision Is Contrary To Lone Star Gas Company v. Texas, 304 U. S. 236 (1938).

The sales of energy by Penn Water to its Pennsylvania customers are matters of local concern which should logically be regulated by a local regulatory commission. The holding of FPC and D. C. Circuit that **all** sales were in interstate commerce and subject to the jurisdiction of FPC is contrary to the decision of Your Honorable Court in **Lone Star Gas Company v. Texas,** 304 U. S. 236 (1938). In that case, a company sold gas to distributing companies in Texas. 11% of the gas was obtained from Oklahoma. The Texas Commission regulated the rates of all gas delivered in Texas including that obtained from Oklahoma and commingled with the Texas gas. It was held that the Texas Com-

mission had not undertaken to regulate the sales and deliveries of gas in interstate commerce. Your Honorable Court said (p. 239):

> "* * * We think that the proved manner in which the gas from Oklahoma was treated and handled in Texas made it an integral part of the gas supplied to the Texas communities in appellant's intrastate business and that the Commission was entitled so to consider it in fixing its rate."

The treatment and amount of the backfeed energy in the instant case also made it an integral part of the energy produced in Pennsylvania and sold to Pennsylvania customers in Penn Water's intrastate business.

The primary features of the operation should control. The sales to Pennsylvania customers are local in nature and primarily intrastate. This is not a matter of permitting the Federal Power Commission to regulate accounting or the sale of securities; it is a matter of limiting the Federal Power Commission to the jurisdiction over rates as specifically set forth in the Federal Power Act.

II. The D. C. Circuit erroneously held, in conflict with the decision of the Fourth Circuit, that the FPC may compel continuance of, and base its orders upon, contractual arrangements which disable a Pennsylvania public utility from performing duties imposed upon it under the law of its state of incorporation and surrender to a foreign public utility the basic rights, powers and privileges which such law, and public policy, require it to exercise independently.

There is a clear conflict between the decisions of the Courts of Appeals for the Fourth Circuit and for the District of Columbia Circuit with respect to the power of the FPC to require continuance of, and base its determinations upon, illegal contractual arrangements contained in the Baltimore and Safe Harbor contracts. The Fourth Circuit held that the parties must find some method of interchanging electrical energy which "would meet with the approval of the appropriate regulatory authority and will not offend * * * the utility laws of Pennsylvania" (R. Vol. 18, p. 28). The D. C. Circuit majority decision did not even refer to this holding and ignoring the fact that the Baltimore and Safe

Harbor contracts were held invalid **in their entirety** because they violated the utility laws of Pennsylvania and public policy, held, in effect, that the FPC could predicate important features of its rate orders upon the assumed existence and continuance thereof, and thus require continuance of illegal provisions contained therein.

The invalidity of the Baltimore and Safe Harbor contracts under state law[9] and public policy[10] does not arise by reason of a mere technical violation of statute or charter. It arises from the fact that the contracts destroy the independent corporate character of the corporations. They completely divest the boards of directors of powers of management which belong to them alone by virtue of their corporate franchises. The contracts deprive Penn Water of the power to perform basic and fundamental duties imposed by Pennsylvania law and, in particular, the initiation of reasonable rates and adequate services. The Fourth Circuit, citing decisions

[9] The State statutes involved are set forth in Appendix A. pp. 41 to 46.

[10] The public policy referred to is not merely state public policy but public policy as laid down in decisions of this Court. **Gibbs v. Consolidated Gas Co. of Baltimore**, 130 U. S. 396 (1889); **Thomas v. Railroad Co.**, 101 U. S. 71 (1879); **Central Transp. Co. v. Pullman's Palace Car Co.**, 139 U. S. 24 (1891).

of this Court, properly held (R. Vol. 18, p. 25): "Indeed such restrictions upon the freedom of a public utility cannot be sustained irrespective of statutory prohibition". Further, it said (R. Vol. 18, p. 26):

> "One of the most important duties of a public utility, inherent in its franchise to serve the public, is the duty to take the initiative in proposing reasonable rates and rendering adequate services, taking into account changing conditions; and the utility is not relieved from this duty because its activities are subject to governmental regulation, for a regulatory commission is not clothed with the responsibility or qualified to manage the utility's business."

The District Court for Maryland in its order invalidating the Safe Harbor contract (R. Vol. 18, p. 45) held that the agreements violate the laws of Pennsylvania governing public utilities, public policy, the common law and are ultra vires, completely destroying "corporate virility".

The Court of Appeals for the Fourth Circuit stated (R. Vol. 18, p. 26):

> "The conclusion is inescapable that the contractual restrictions upon the power of Penn Water to perform its functions as a

utility under the Pennsylvania statutes are invalid.

This conclusion is not avoided by the fact that Penn Water is a public utility under Part II of the Federal Power Act and subject as such to the regulation of the Federal Power Commission."

The District Court for Maryland was in accord, stating (R. Vol. 18, p. 45) that the Safe Harbor contract deprives that company of "the discretion and initiative necessary to respond and be alive to its public obligations", and is "intolerable under the common law and statutes of the State of Pennsylvania".

These courts specifically allude to certain of the restrictive provisions of the contracts, including the provisions restricting contracts and plant expansion (R. Vol. 18, pp. 25, 42, 43) and requiring concurrence of Consolidated in operating, engineering and accounting matters (R. Vol. 18, pp. 7-8, 45). The FPC orders which were affirmed by the D. C. Circuit, on the other hand, commended and condoned these provisions (R. Vol. 16, pp. 181 and 378-379).

The FPC orders specifically require continuance of the payment provisions. These provisions are also restrictive and illegal under

the Pennsylvania public utility laws, and public policy, because they provide that Penn Water shall receive a specified return regardless of the quantity or quality of services rendered and thereby remove all incentive to exercise initiative with respect to rates and services, to obtain new business, or to effect operating economies. The Court of Appeals for the Eighth Circuit held a contract containing such provisions (as well as price fixing provisions) "contrary to public policy, and void" in **Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.**, 61 Fed. 993, 997 (8th Cir. 1894), stating:

> "* * * The contract removed every incentive to the companies to afford the public proper facilities, and to carry at reasonable rates; for, under its provisions, a company is entitled to its full percentage of gross earnings, even though it does not carry a pound of freight. The necessary and inevitable result of such a contract is to foster and create poorer service and higher rates. There is no inducement for a road to furnish good service, and carry at reasonable rates, when it receives as much or more for poor service, or for no service, as it would receive for good service and an energetic struggle for business.

> "A railroad company is a quasi public corporation, and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. Any contract by which it disables itself from performing these duties, or which makes it to its interest not to perform them, **or removes all incentive to their performance, is contrary to public policy and void;** * * *."

That decision followed and cites **Gibbs v. Consolidated Gas Co. of Baltimore,** 130 U. S. 396, 406, 410-11 (1889), cited by the Fourth Circuit (R., Vol. 18, pp. 25).

Section 1 of the Public Service Company Law [11] and Sections 301 and 401, of the Pennsylvania Public Utility Law,[12] imposing upon public utilities the duty to furnish adequate services at reasonable rates are, in effect, statutory reaffirmations of this public policy and prohibit revenue pooling arrangements like that contained in the Baltimore contract, as well as the other types of restrictive provisions contained therein.

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[11] Appendix A, p. 41.
[12] Appendix A, pp. 44-45.

The statement of the D. C. Circuit that the Fourth Circuit only held illegal certain restraints imposed upon Penn Water by Consolidated under the Baltimore contract is, therefore, immaterial, since the illegal revenue pooling provisions are clearly directed by the FPC orders to be continued in effect. Furthermore, as already pointed out, the orders are based upon the assumed continued existence of *contracts* which the courts in the Fourth Circuit ruled invalid in their entirety. The orders cannot be based upon their own requirements. For example, the allocation of the major share of the rate reduction to Consolidated, is based upon its alleged "entitlements" under the contract. No evidence exists, other than the contracts, upon which the FPC could predicate a decision as to the existence of such entitlements.

While the Federal Power Act gives the FPC jurisdiction over rates and services, it does not give it any power or authority to breathe into state corporations powers, franchises or other rights which they do not possess under the laws of their states of incorporation. This is pointed out in the Fourth Circuit opinion (R. Vol. 18, p. 27-28), which states (citing Section 201(b) (16 U.S.C. Section 824(b)):

"There is, however, a limitation upon the jurisdiction of the Federal Power Commis-

sion over public utilities subject to Part II * * *."

and concludes that "there is a field in which the Pennsylvania Utility Commission is qualified to act."

The legislative history of Part II of the Act shows that Congress intended to give the FPC powers **supplementary** to those exercised by the states and only to regulate in that area of commerce which was beyond the reach of the states under the decision in **Public Utilities Commission v. Attleboro Steam & Electric Co.**, 273 U.S. 83 (1927).[13] Since the power of the FPC to regulate rates and services is made merely *supplemental* to the regulatory powers of the states, there was clearly no intention on the part of Congress to displace the authority of the states over the inherent powers of corporations created by them.

There is no indication anywhere in the Federal Power Act that it was intended to permit the

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[13] Hearings on H.R. 5423 before the House of Representatives Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., Pt. 1, p. 384. Quoted in **Connecticut Light & Power Co. v. FPC**, 324 U.S. 515, 525 (1945), and in **Jersey Central Power & Light Co. v. FPC**, 129 F. 2d 183, 193 (3d Cir. 1942).

FPC to require the performance of contractual arrangements depriving state utilities of their independence and initiative with respect to rates and services in violation of state law.

Your Honorable Court has frequently held that an intention by Congress to preclude a state from exercising its traditional powers must be clearly manifested. See **International Union, U.A.W. v. Wisconsin Employment Relations Board,** 336 U.S. 245, 253 (1949); **Davies Whse. Co. v. Bowles,** 321 U.S. 144, 152 (1944); *California v. Zook,* 336 U.S. 725, 733 (1948) and cases cited. A state law is superseded by a Federal law "only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together' ". **Kelly v. Washington,** 302 U.S. 1, 10 (1937).

As Your Honorable Court held in **Hines v. Davidowitz,** 312 U.S. 52, 67 (1941), the controlling question is "whether, under the circumstances of this particular case, Pennsylvania law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Even where a federal agency charged with regulating certain phases of interstate commerce has authority to override state law, this Court has held such authority may be exercised only where neces-

sary to perform the function assigned the agency by Congress.

Florida v. U.S., 282 U.S. 194 (1931).

Clearly, no such necessity exists in this case because, as the Fourth Circuit suggested, the FPC can regulate the interstate rates and services of Penn Water without imposing upon it a contract which is in violation of state law and public policy. Especially is this true where, as in the instant case, the illegality of the Baltimore contract arises out of the fact that it deprives Penn Water of the power to **initiate** rates and services in the first instance, which power the D. C. Circuit concedes (R. Vol. 18, p. 53) to be "a condition precedent to the proper operation of the rate-making process."[14]

As the Fourth Circuit pointed out (R. Vol. 18, p. 28), the approval of both the Federal and State Commissions may properly be required. See **Lake Shore & Michigan Southern Railroad Co. v. Ohio**, 165 U.S. 365 (1897) and **Cummings v. Chicago**, 188 U.S. 410 (1903), holding that the construction of a bridge and dock, respectively,

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[14] It is noteworthy in this connection that the policy of the Pennsylvania Public Utility Law is consistent with the policy laid down by the decisions of your Honorable Court cited by the Fourth Circuit (R., Vol. 18, pp. 25-26).

in navigable rivers, even though approved by Secretary of War pursuant to the River and Harbor Acts of 1890 (c. 907, 26 Stat. 426) and 1899 (c. 429, 30 Stat. 1121) respectively, required approval of state authorities also.

In **McGuinn v. City of High Point,** 217 N.C. 449, 8 S.E. 2d 462 (1940), it was held that the granting of a project license by FPC did not give the licensee additional corporate powers, and that the lack of such power under state law prevented the operation of the project by such licensee. In **Northern Pennsylvania Power Co. v. Pennsylvania Public Utility Commission,** 132 Pa. Super. 178, 200 Atl. 866 (1938), reversed on other grounds, 333 Pa. 265, 5 A. 2d 133 (1939), it was held that a merger approved by FPC also required the approval of your petitioner.

III. The decision of the D. C. Circuit affirming FPC's determination of jurisdiction over Penn Water's sales in Pennsylvania is in conflict with the decision of the Fourth Circuit and erroneous because such determination, and the D. C. Circuit decision, are based upon the assumed existence and continuance of the illegal Baltimore and Safe Harbor contracts.

FPC in its first opinion (R., Vol. 16, pp. 53-54) makes it clear that its decision as to jurisdiction over Penn Water's sales in Pennsylvania is based upon the fact that the facilities of Penn Water, Transmission Company, Safe Harbor and Baltimore Company are "operated as an integrated and coordinated electric system" and that all of Penn Water's and Transmission Company's facilities are "integral parts of that system". The Commission states (p. 53) that the illegal contracts "were designed to facilitate this completely integrated operation of system generating and transmitting facilities" and calls them the "system foundation contracts" (pp. 53, 378). The existence of the so-called integrated and coordinated system is plainly dependent upon

the restrictive provisions of the agreements through which Consolidated controls the other companies. FPC shows this by its reference (pp. 54-54) to Article VIII[15] which not only provides for intercompany cooperation but also prohibits Penn Water from taking any action with respect to operating, engineering and accounting matters without the consent of a representative of Consolidated. The Safe Harbor contract contains a similar provision (Article XIV, R., Vol. 15, p. 4567) specifically held illegal by the District Court for Maryland (R., Vol. 18, p. 45). Similarly the Commission refers (p. 54) to "the provisions for over-all compensation to Penn Water and Safe Harbor without regard to the amounts delivered" (the illegal revenue pooling provisions) as "Contributing to the accomplishment of complete integration".

FPC also predicates its decision as to jurisdiction on the intermingling of power purchased from Consolidated with other power produced by Penn Water for the purpose of sale to the Pennsylvania customers (R., Vol. 16, pp. 54-55). This intermingling, as the FPC states, is likewise dependent upon the illegal contracts. It

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[15]Article VIII is set forth in full at R., Vol. 15, pp. 4613-14.

says (p. 55): "The very purpose of the system foundation contracts was the elimination of artificial barriers such as State boundaries". Also, in its opinion (February 28, 1949) denying rehearing, the FPC pointed out (R., Vol. 16, p. 380) that "refusal of Penn Water to receive energy originating outside of Pennsylvania from Baltimore Company" could not be effected in compliance with the contract. This is, of course, primarily due to the fact that under Article IV (R., Vol. 15, p. 4612), Penn Water cannot purchase the supplemental energy which it needs to supply its Pennsylvania customers from any one other than Consolidated without Consolidated's consent.

Under applicable decisions of this Court, the mere mingling of the power purchased from Consolidated with that produced and sold by Penn Water in Pennsylvania would not, apart from the existence of the contracts requiring such intermingling and tying the companies together into the so-called "integrated system", be sufficient grounds for holding such sales in Pennsylvania to be sales in interstate commerce.

Wherefore, Pennsylvania Public Utility Commission, petitioner, respectfully prays your Honorable Court to issue the requested writ of

certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,
Pennsylvania Public Utility Commission,
By: WILLIAM J. GROVE,
Assistant Counsel,
THOMAS M. KERRIGAN,
Assistant Counsel,
LLOYD S. BENJAMIN,
Acting Counsel

November 16, 1951.

APPENDIX A

TEXT OF PERTINENT STATE STATUTES (EXCERPTS)

Pennsylvania Public Service Company Law.*

Article I—Definitions

"Section 1. * * *

"The term 'Public Service Company', when used in this act, includes all * * * water-power corporations * * * ".

Article II—Duties and Liabilities of Public Service Companies

"Section 1. It shall be the duty of every public service company—

"(a) To furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate, and practically suf-

*Approved July 26, 1913, Pamphlet Laws 1374 (Effective January 1, 1914) as amended and supplemented.

ficient for the accommodation and safety of its patrons, employes, and the public, and in conformity with such reasonable regulations or orders, as may be made by the commission.

"(b) To render and furnish all such service at prices, charges, rates, tolls, fares or compensation that shall be just and reasonable, and in conformity with such reasonable regulations or orders as may be made by the commission.

"(c) To make all such repairs, changes, alterations and improvements in or to such service, including facilities, as shall be reasonably necessary for the accommodation or safety of its patrons, employes and the public. * * *"

Article III—Creation, Powers and Limitation of Powers, of Public Service Companies

"Section 3. Upon like approval of the commission first had and obtained, as aforesaid, and upon compliance with existing laws, and not otherwise, it shall be lawful—

* * * * * * *

"(c) For any public service company to sell, assign, transfer, lease, consolidate, or merge its property, powers, franchises, or privileges, or any of them, to or with any other corporation or person."

Appendix A

Pennsylvania Public Utility Law.*

Article I—Short Title and Definitions

"Section 2. Definitions.—The following words, terms and phrases shall have the meanings ascribed to them in this section, unless the context clearly indicates otherwise.

* * * * * * *

"(17) 'Public Utility' means persons or corporations now or hereafter owning or operating in this Commonwealth equipment, or facilities for:

"(a) Producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat or power to or for the public for compensation; * * *"

Article II—Certificate of Public Convenience

"Section 202. Enumeration of Acts Requiring Certificate.—Upon approval of the commission, evidenced by its certificate of public convenience

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*Approved May 28, 1937, Pamphlet Laws 1053 (Effective June 1, 1937), as amended and supplemented. (66 Purdon's Pennsylvania Statutes Annotated, Sec. 1101 *et seq.*) This Law superseded the Public Service Company Law.

first had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful:

* * * * * * *

"(d) For any public utility to dissolve, or to abandon or surrender, in whole or in part, any service, rights, power, franchise, or privilege: * * *.

"(e) For any public utility, except a common carrier by railroad subject to the Interstate Commerce Act, to acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service: * * *."

Article III—Rates and Rate Making

"Section 301. Rates to Be Just and Reasonable.—Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission: * * *."

Article IV—Service and Facilities

"Section 401. Charter of Service and Facilities.—Every public utility shall furnish and

maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons, employes and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this act and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. * * *."

Pennsylvania Laws Governing Corporations.

Section Five of Corporation Act of 1874.*

The business of every corporation created hereunder, or accepting the same, shall be managed and conducted by a president, a board of directors or trustees, a secretary or clerk, a treasurer, and such other officers, agents and factors as the corporation authorizes for that

*As amended by Act of May 14, 1891, P. L. 61, and Act of May 6, 1927, P. L. 828 (No. 417).

purpose, * * *. The members of said corporation may, at a meeting to be called for that purpose, determine, fix or change the number of directors or trustees that shall thereafter govern its affairs, and a majority of the whole number of such directors or trustees shall be necessary to constitute a quorum * * *.

Section one of Act of May 31, 1887, P. L. 281 (No. 166).

SECTION 1. *Be it enacted, &c.*, That it shall be lawful, from and after the passage of this act, for any corporation, chartered or existing by or under any law of this State, to determine, by the vote of its stockholders holding a majority in interest of all of its stock, at a meeting duly called for the purpose, the time of holding the annual meeting for the election of officers of the corporation, and the number of directors that shall thereafter govern its affairs: *Provided*, That the number of directors so determined shall not be less than three nor more than fifteen, and that at least one third of the directors of every corporation shall be and remain, during their term of service, residents of the State of Pennsylvania: * * *.

BRIEF FOR PETITION -ER

IN THE

Supreme Court of the United States

October Term, 1951

No. 429

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner

vs.

FEDERAL POWER COMMISSION

BRIEF FOR PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

TABLE OF CITATIONS

Preliminary Statement

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BRIEF FOR PETITIONER

PRELIMINARY STATEMENT

Your Honorable Court issued a writ of certiorari to review the judgment and orders of the United States Court of Appeals for the District of Columbia, entered by a divided court July 3 and 6, and September 6, 1951 (R. Vol. XVIII, pp. 5394, 5395, 5399).

Preliminary Statement

The judgment and orders denied motions to set aside orders of the Federal Power Commission (FPC), directing continuance of, and premised on, provisions of two power contracts, adjudged illegal by the United States Court of Appeals for the Fourth Circuit as being in violation of the antitrust laws, the law of Pennsylvania and of the common law (R. Vol. XVIII, 5322 and Opinion in Case No. 6315 January 3, 1952).[1]

[1] Pennsylvania Water & Power Co., Pennsylvania Public Utility Commission v. Consolidated Gas Electric Light & Power Company of Baltimore, Public Service Commission of Maryland, 184 F. 2d 552 (1940), cert. den. 340 U. S. 906 (1950), relating to the Baltimore contract. Pennsylvania Water & Power Co., Pennsylvania Public Utility Commission v. Consolidated Gas Electric Light & Power Co., Safe Harbor Water Power Corporation, Public Service Commission of Maryland, No. 6315, January 3, 1952, affirming District Court of Maryland, 97 F. Supp. 952 (May 3, 1951) and Docket No. 5253 (Op. March 12, 1951, and Order March 19, 1951), relating to the companion Safe Harbor contract.

OPINIONS BELOW

The majority opinion (R. Vol. XVIII, p. 5367) of the D. C. Circuit, per Bazelon, J., in which Fahy, J., joined (D. C. majority), and the dissenting opinion (R. Vol. XVIII, p. 5402) of Wilbur K. Miller, J., are reported at 193 F. 2d 230. The opinions and orders of the FPC of January 5, 1949, February 28, 1949, March 17, 1949, October 27, 1949, and December 15, 1949, which were affirmed by the D. C. majority, are found at R. Vol. XVI, pp. 4845, 5178, 5220 and Vol. XVII, pp. 5267, 5315.

JURISDICTION

The petition for a writ of certiorari was filed November 16, 1951, and was granted February 4, 1952. The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code (62 Stat. 928, U. S. C. §1254 (1) and Section 313 (b) of the Act (49 Stat. 860, 16 U. S. C. §825 (1)).

STATEMENT OF THE CASE

(a) The Parties Involved and Their Interests and Business

Pennsylvania Public Utility Commission, your petitioner, is the administrative agency within the Commonwealth of Pennsylvania to which has been delegated the power and upon which has been conferred the duties of enforcing the public utility laws and of regulating rates and services of public utilities engaged in intrastate commerce.

Pennsylvania Water and Power Company, hereafter designated Penn Water, and Safe Harbor Water Power Corporation, hereafter designated Safe Harbor, are Pennsylvania electric utility corporations subject to the jurisdiction of your petitioner. Both corporations own hydro-electric generating plants on the Susquehanna River. Penn Water also owns a steam generating plant and transmission lines in Pennsylvania, and, through its wholly owned subsidiary, transmission lines in Maryland. The present business of such companies is the sale of electric energy at wholesale and in bulk.

Penn Water's wholesale customers include Philadelphia Electric Company, Pennsylvania Power & Light Company and Metropolitan Edison Company (PE, PP&L and ME). These are Pennsylvania electric utilities, having steam electric generating plants and transmission and distribution facilities in Pennsylvania, and sell both at wholesale and at retail. They are also subject to the jurisdiction of your petitioner, Pennsylvania Public Utility Commission.

Consolidated Gas Electric Light & Power Company of Baltimore, hereafter designated Consolidated, is a Maryland electric utility corporation with steam electric generating, transmission and distribution facilities in and around the City of Baltimore, Maryland. Consolidated has generating capacity several times that of Penn Water or Safe Harbor and is in the business of selling electric energy at wholesale and in bulk as well as at retail.

(b) The Proceedings before the FPC and the D.C. Circuit

The FPC orders were entered as a result of a proceeding by FPC in September, 1944, to examine into the rates charged by Penn Water to Consolidated. Hearings began in 1946 and were completed in July, 1947. Consolidated, the Maryland Com-

mission and the Pennsylvania Commission intervened in the proceeding.

FPC assumed jurisdiction not only of Penn Water's rates to Consolidated but also of the rates for Penn Water's services in Pennsylvania to the three electric utilities in Pennsylvania, PP&L, PE and ME.

The FPC orders (1) directed continuance of illegal contractual arrangements contained in the Baltimore contract; and (2) based critical dispositions in its orders upon the assumed existence and continuance of both the illegal Baltimore and Safe Harbor contracts by (a) basing its jurisdiction over rates for Penn Water's services in Pennsylvania to its three Pennsylvania customers upon the existence of an alleged single interstate system (the facilities of Consolidated, Penn Water and Safe Harbor) created by the two illegal contracts, and upon interstate purchases of power by Penn Water from Consolidated required by an exclusive dealing provision in the Baltimore contract adjudged illegal *per se* under Section 3 of the Clayton Act, and (b) by basing its findings of revenue and expenses, allocation of costs and allocation of the reduction, predominately to Consolidated as against the three Pennsylvania customers of Penn Water, on "entitlements" and "obligations" created solely by the two illegal contracts.

The first FPC order was issued January 5, 1949, eighteen months after the last hearing and shortly after the contract litigation had been begun. The illegalities of the contracts, as raised by the contract litigation, were immediately brought to the attention of the FPC in a petition for rehearing, January 28, 1949. FPC denied rehearing February 28, 1949 and held that, even if the Courts determined the contracts to be illegal, such illegalities would be immaterial to its orders.

The FPC orders are expressed to be operative from and after February 1, 1949, but their effect was stayed by order of the FPC, and then by order of the D. C. Circuit, and revenues collected by Penn Water under its contract with its four electric utility customers in excess of the amounts allowed by the FPC orders have been segregated to await the final determination of the case.

Petitions to the D. C. Circuit to review the FPC orders brought to the attention of that Court the illegalities of the Baltimore and Safe Harbor contracts, raised in the contract litigation, as grounds for annulling or remanding the orders (R. Vol. XVI, pp. 4807-13; R. Vol. XVII, pp. 5222, 5230).

Prior to the completion of the filing of briefs in the D. C. Circuit in the present case, and after the Fourth Circuit decision invalidating the Baltimore contract, Petitioner moved (November 21, 1950) in

the D. C. Circuit to present that decision to the D. C. Circuit as a basis for annulling or remanding the FPC orders on the ground that they were founded on the illegal Baltimore contract. When this Court denied certiorari in the Baltimore contract case, leave was granted by the D. C. Circuit and the matter was briefed and argued. While the decision was pending below, and immediately following the decision of the District Court for Maryland invalidating the Safe Harbor contract, Petitioner moved (May 8, 1951) in the D. C. Circuit to annul or remand the FPC orders on the further ground that they were founded also on the illegal Safe Harbor contract. The motion was denied.

(c) The Contracts

The invalidated Penn Water, Baltimore and Safe Harbor contracts, which would have remained in effect until 1980, provided for payments by Consolidated for power, not on a unit rate basis, but on a basis which would provide to the seller recovery of operating expenses including taxes and a specified return on investment, regardless of the amount of power delivered or extent of services rendered, with a credit to Consolidated for revenues received from sales of power to others. This arrangement is in

clear violation of the Pennsylvania Public Utility Law which requires utilities to establish and maintain reasonable rates and furnish adequate service. The obvious purpose and effect of the arrangements in issue are to remove incentive to compete, to expand or to effect operating economies. The contracts contain closely associated provisions providing for control by Consolidated over the contracts, sales, purchases, prices, output and expansion of both Penn Water and Safe Harbor which are also illegal under Pennsylvania Law, public policy and the antitrust laws, and were specifically alluded to as being illegal under such laws by the decisions of the Fourth Circuit and the District Court of Maryland.

The contracts surrender control of Penn Water and Safe Harbor to Consolidated, stifle their initiative with respect to rates and services and virtually destroy the independent corporate character of these Pennsylvania corporations. The provisions of the contracts have been used by Consolidated to interfere with Penn Water's and Safe Harbor's contracts with their Pennsylvania customers[2] and to prohibit Penn Water from building a new large

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[2] PP&L, PE and ME. The contracts with these customers are all on the customary unit rate basis, i.e., payment based on amount of power delivered and without managerial control and restraints by the purchaser over the seller.

steam electric generating plant in 1948 from which badly needed power could have been economically produced.

(d) Provisions of the FPC Orders

FPC, in its opinion denying rehearing (February 28, 1949), held immaterial to its rate orders the possible illegality of the Baltimore and Safe Harbor contracts.

FPC approved in emphatic terms the restrictive controls of the Baltimore contract; such as Article VIII[3] requiring the consent of Consolidated to any action by Penn Water with respect to operating, engineering, or accounting matters (R. Vol. XV, p. 4564), Article IV requiring the consent of Consolidated to purchases and sales by Penn Water (R. Vol. XV, pp. 4558-59) and Article V requiring the consent of Consolidated to substantial expansions by Penn Water (R. Vol. XV, p. 4559).

The FPC orders were based upon the assumed existence of the entire contracts, including the restrictive provisions specifically referred to as illegal by the decisions of the Fourth Circuit and the Dis-

[3] The entire text of these Articles are set forth at R. Vol. XV, p. 4554.

trict Court for Maryland. FPC, relying upon Baltimore and Safe Harbor contracts as "foundation contracts", held that certain operations thereunder, the wholesale of electric energy by Penn Water to the three Pennsylvania electric utilities, otherwise intrastate, were interstate in character and subject to regulation by it. Actually, these services are rendered wholly within the State of Pennsylvania, but FPC held them interstate on the grounds (R. Vol. XVI, pp. 4859-61) that Penn Water was part of an integrated system (created by the illegal contracts and continued by FPC direction) and that power purchased from Consolidated was used to supplement the power generated by Penn Water and sold in Pennsylvania (Article IV of the Baltimore contract permitting Consolidated to require that such supplemental power be purchased from it by preventing such purchase from others).

FPC held that the sales of electric energy by Penn Water to its Pennsylvania customers constituted sales in interstate commerce. It dismissed the contentions made by your petitioner that FPC lacked jurisdiction over the sale of energy produced in Pennsylvania and sold to Pennsylvania customers and that sales to Pennsylvania customers are local in character and the interstate commerce, if any involved, so negligible as to be incidental to the dominant intrastate business and as such not interstate commerce. Instead, it concluded that, by

reason of the contractual arrangement, the system was "an integrated and coordinated electric system" (R. Vol. XVI, p. 4859) and that each of Penn Water's sales in Pennsylvania "is clearly a system transaction of a character wholly interstate even though at times it involves varying amounts of energy never crossing the State boundary, sometimes unmixed and sometimes mixed with out-of-state energy" (R. Vol. XVI, p. 4861).

FPC based its allocation of the reduction between Consolidated and the three Pennsylvania electric utility customers of Penn Water, giving the major share of the reduction to Consolidated, on the basis of alleged "entitlements" of Consolidated under the Baltimore and Safe Harbor contracts and not on the basis of the power actually delivered. An allocation on the latter basis would have given the Pennsylvania utilities a much greater share of the rate reduction.

ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia Circuit erred in holding that:

I. Where electric energy is produced in Pennsylvania and thereafter sometimes commingled with electric energy flowing from another state and sold to Pennsylvania customers and where the proportions of such respective energy are ascertainable, such sales are in interstate commerce within the scope and intendment of the Federal Power Act and subject to the jurisdiction of FPC.

II. FPC may compel a Pennsylvania public utility to maintain contractual arrangements, whereby such corporation is disabled from properly performing its duties under the law of the state of its incorporation and surrenders basic rights, powers and privileges inherent in that franchise to a foreign public utility.

III. FPC may premise its findings as regards jurisdiction and other critical provisions of its rate orders upon the existence and continuance of illegal and invalid contracts, more particularly, findings regarding allocation of reduction in rates.

SUMMARY OF ARGUMENT

Pennsylvania Public Utility Commission ultimately seeks to be free from FPC interference as regards enforcement of orders and regulations pertaining to the intrastate rates and services of Penn Water, to the end that the Commission may perform properly the duties imposed upon it and exercise the powers delegated to it by the Pennsylvania Public Utility Law.

Petitioner contends that Your Honorable Court should set aside the orders of the FPC or, in the alternative remand the case to FPC with directions (a) that its jurisdiction be limited to determination of the reasonableness of rates for power sold in interstate commerce by Penn Water and Transmission Company to Consolidated, and (b) to determine such rates without regard to the illegal contracts and on a unit rate basis to be determined by the amount of capacity and energy actually supplied, with allocations of reductions, if any be made, to be based on costs of service for energy supplied and services actually rendered and not on fictitious "entitlements."

ARGUMENT

I. Where Electric Energy Is Produced in Pennsylvania and Thereafter Commingled with Electric Energy Flowing from Another State and Sold to Pennsylvania Customers and Where the Respective Portions of Such Energy Are Ascertainable, the Sale of Such Energy Is Subject to the Jurisdiction of the Pennsylvania Public Utility Commission

(a) Pennsylvania Public Utility Commission has jurisdiction under Peoples Gas Company v. Public Service Commission, 270 U. S. 550, 46 Sup. Ct. 371 (1926).

The energy produced and sold in Pennsylvania is in intrastate commerce, irrespective of whether mingled with energy of another state. In *Peoples Gas Co. v. Public Service Commission*, 270 U. S. 550, 554-555, 46 Sup. Ct. 371 (1926) the Gas Company received two-thirds of its gas from West Virginia and produced the other one-third in Pennsylvania. The gas from both sources was mixed and

sold to various customers. Your Honorable Court held that the West Virginia gas was in interstate commerce but that the Pennsylvania gas was in intrastate commerce only. It was said:

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other. Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265; United Fuel Gas Co. v. Hallanan, 257 U. S. 277; 281. And see Hallanan v. Eureka Pipe Line Co., 261 U. S. 393; Hallanan v. United Fuel Gas Co., 261 U. S. 398."

The fact of commingling with electric energy from another state does not affect the true nature of that produced and sold within the state. Particularly is that true where, as here, a division between purely intrastate energy and energy obtained from Consolidated is entirely practical. While impliedly denying the practicality in one portion of its order,

FPC recognized the feasibility and duty of making similar allocations in its order of October 27, 1949 (R. Vol. XVII, p. 53). FPC there specified in each of the three schedules of rates to the Pennsylvania customers an identical formula for fuel cost adjustment applicable to the portion of the kilowatt-hours sold as firm energy to Pennsylvania customers which is supplied by the Baltimore Company. The separation of sources of supply which FPC made in this latter matter is the type of allocation it should have made between intrastate and interstate sources of electric energy.

Your Honorable Court has approved FPC allocations where a utility's business consisted of intrastate sales, direct industrial and interstate wholesale: *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U. S. 581, 65 Sup. Ct. 829 (1945); *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U. S. 635, 65 Sup. Ct. 821 (1945). Recognition of the practicalities of an allocation of source of energy which, on the basis of the instant record, is approximately 88% intrastate and 17% interstate, compels the conclusion that sales involving interstate commerce are negligible and sales in intrastate commerce predominant.

(b) Pennsylvania Public Utility Commission has jurisdiction under Lone Star Gas Company v. Texas, 304 U. S. 224, 236, 58 Sup. Ct. 833 (1938).

The sales of energy by Penn Water to its Pennsylvania customers are matters of local concern which should logically be regulated by a local regulatory commission. The holding of FPC and D. C. Circuit that all sales were in interstate commerce and subject to the jurisdiction of FPC is contrary to the decision of Your Honorable Court in *Lone Star Gas Company v. Texas*, 304 U. S. 224, 236, 58 Sup. Ct. 883 (1938).

In *Lone Star Gas Company v. Texas*, supra, a company sold gas to distributing companies in Texas. 11% of the gas was obtained from Oklahoma. The Texas Commission regulated the rates of all gas delivered in Texas including that obtained from Oklahoma and commingled with the Texas gas. It was held that the Texas Commission had not undertaken to regulate the sales and deliveries of gas in interstate commerce. Your Honorable Court said (p. 239):

> "* * * We think that the proved manner in which the gas from Oklahoma was treated and handled in Texas made it an integral part of the gas supplied to the Texas communities in

appellant's intrastate business and that the Commission was entitled so to consider it in fixing its rate."

The treatment and amount of the backfeed energy in the instant case also made it an integral part of the energy produced in Pennsylvania and sold to Pennsylvania customers in Penn Water's intrastate business.

The primary features of the operation should control. The sales to Pennsylvania customers are local in nature and primarily intrastate. This is not a matter of permitting the Federal Power Commission to regulate accounting or the sale of securities; it is a matter of limiting the Federal Power Commission to the jurisdiction over rates as specifically set forth in the Federal Power Act.

II. FPC May Not Compel a Pennsylvania Public Utility to Maintain Contractual Arrangements whereby Such Corporation Is disabled from Properly Performing Its Duties under the Law of the State of Its Incorporation and Surrender Basic Rights, Powers and Privileges to a Foreign Public Utility

(a) The FPC order based upon the invalid contracts disables Pennsylvania Water and Power Company from performing duties imposed upon it under Pennsylvania law.

The invalidity of the Baltimore and Safe Harbor contracts under state law[4] and public policy[5] does not arise by reason of a mere technical violation of statute or charter. It arises from the fact that the contracts destroy the independent corporate character of the corporations. They completely divest

[4] The State statutes involved are set forth in Appendix A.

[5] The public policy referred to is not merely state public policy but public policy as laid down in decisions of this Court: Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396 (1889); Thomas v. Railroad Co., 101 U. S. 71 (1879); Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24 (1891).

the board of directors of powers of management which belong to them alone by virtue of their corporate franchises. The contracts deprive Penn Water of the power to perform basic and fundamental duties imposed by Pennsylvania law and, in particular, the initiation of reasonable rates and adequate services. The Fourth Circuit, citing decisions of this Court, properly held (R. Vol. XVIII, p. 5346). "Indeed such restrictions upon the freedom of a public utility cannot be sustained irrespective of statutory prohibition". Further, it said (R. Vol. XVIII, p. 5347):

> "One of the most important duties of a public utility, inherent in its franchise to serve the public, is the duty to take the initiative in proposing reasonable rates and rendering adequate services, taking into account changing conditions; and the utility is not relieved from this duty because its activities are subject to governmental regulation, for a regulatory commission is not clothed with the responsibility or qualified to manage the utility's business."

The District Court of Maryland in its order invalidating the Safe Harbor contract (R. Vol. XVIII, p. 5366) held that the agreements violate the laws of Pennsylvania governing public utilities, public policy, the common law and are ultra vires, completely destroying "corporate virility".

The Court of Appeals for the Fourth Circuit stated (R. Vol. XVIII, p. 5347):

> "The conclusion is inescapable that the contractual restrictions upon the power of Penn Water to perform its functions as a utility under the Pennsylvania statutes are invalid."

The District Court of Maryland was in accord, stating (R. Vol. XVIII, p. 5366) that the Safe Harbor contract deprives that company of "the discretion and initiative necessary to respond and be alive to its public obligations", and is "intolerable under the common law and statutes of the State of Pennsylvania".

These courts specifically allude to certain of the restrictive provisions of the contracts, including the provisions restricting contracts and plant expansion (R. Vol. XVIII, pp. 5346, 5363, 5364) and requiring concurrence of Consolidated in operating, engineering and accounting matters (R. Vol. XVIII, pp. 5328, 5329, 5366). The FPC orders which were affirmed by the D. C. Circuit, on the other hand, commended and condoned these provisions (R. Vol. XVI, pp. 4987, 5184, 5185).

The FPC orders approved by a majority of the D. C. Circuit specifically require continuance of the payment provisions. These provisions are also restrictive and illegal under the Pennsylvania public

utility laws, and public policy, because they provide that Penn Water shall receive a specified return regardless of the quantity or quality of services rendered and thereby remove all incentive to exercise initiative with respect to rates and services, to obtain new business, or to effect operating economies.

The Court of Appeals for the Eighth Circuit held a contract containing such provisions (as well as price fixing provisions) "contrary to public policy and void" in *Chicago, M & St. P. R. Co.*, 61 Fed. 993, 997 (8th Cir., 1894), stating:

> "* * * The contract removed every incentive to the companies to afford the public proper facilities, and to carry at reasonable rates; for, under its provisions, a company is entitled to its full percentage of gross earnings, even though it does not carry a pound of freight. The necessary and inevitable result of such a contract is to foster and create poorer service and higher rates. There is no inducement for a road to furnish good service, and carry at reasonable rates, when it receives as much or more for poor service, or for no service, as it would receive for good service and an energetic struggle for business.
>
> "A railroad company is a quasi public corporation, and owes certain duties to the public,

among which are the duties to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. Any contract by which it disables itself from performing these duties, or which makes it to its interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void, * * *."

That decision followed and cites *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 406, 410-11 (1889), cited by the Fourth Circuit (R. Vol. XVIII, p. 5346).

Section 1 of the Public Service Company Law[6] and Sections 301 and 401, of the Pennsylvania Public Utility Law[7], imposing upon public utilities the duty to furnish adequate services at reasonable rates are, in effect, statutory reaffirmations of the public policy and prohibit revenue pooling arrangements like that contained in the Baltimore contract, as well as the other types of restrictive provisions contained therein.

The statement of the D. C. Circuit that the Fourth Circuit held illegal only certain restraints imposed upon Penn Water by Consolidated under the Baltimore contract is, therefore, immaterial,

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[6] Appendix A, p. 45.

[7] Appendix A, p. 48.

since the illegal revenue pooling provisions are clearly directed by the FPC orders to be continued in effect. Furthermore, as already pointed out, the orders are based upon the assumed continued existence of contracts which the courts in the Fourth Circuit ruled invalid in their entirety. The orders cannot be based upon their own requirements.

While the Federal Power Act gives the FPC jurisdiction over rates and services, it does not give it any power or authority to breathe into state corporations powers, franchises or other rights which they do not possess under the laws of their states of incorporation. This is pointed out in the Fourth Circuit opinion (R. Vol. XVIII, p. 5348, 5349), which states (citing Section 201(b) (16 U.S.C. Section 824 (b)):

> "There is, however, a limitation upon the jurisdiction of the Federal Power Commission over public utilities subject to Part II * * *."

and concludes that "there is a field in which the Pennsylvania Public Utility Commission is qualified to act."

The legislative history of Part II of the Act shows that Congress intended to give the FPC powers supplementary to those exercised by the states and only to regulate in that area of commerce which was

beyond the reach of the states under the decision in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 47 Sup. Ct. 294 (1927).[8] Since the power of the FPC to regulate rates and services is made merely supplemental to the regulatory powers of the states, there was clearly no intention on the part of Congress to displace the authority of the states over the inherent powers of corporations created by them.

There is no indication anywhere in the Federal Power Act that it was intended to permit the FPC to require the performance of contractual arrangements depriving state utilities of their independence and initiative with respect to rates and services in violation of state law.

Your Honorable Court has frequently held that an intention by Congress to preclude a state from exercising its traditional powers must be clearly manifested. See *International Union, U. A. W. v. Wisconsin Employment Relations Board*, 336 U. S. 245, 253, 69 Sup. Ct. 516 (1949); *Davies Whse. Co. v. Bowles*, 321 U. S. 144, 152 64 Sup. Ct. 474 (1944);

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[8] Hearings on H.R. 5423 before the House of Representatives Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., Pt. 1, p. 384. Quoted in Connecticut Light & Power Co. v. FPC, 324 U. S. 515, 525 (1945), and in Jersey Central Power & Light Co. v. FPC, 129 F. 2d 183, 193 (3d Cir. 1942).

California v. Zook, 336 U. S. 725, 733, 69 Sup. Ct. 841 (1948) and cases cited. A state law is superseded by a Federal law "only where the repugnance or conflict is so 'direct and positive' that the two [illegible] cannot 'be reconciled or consistently stand together' ". *Kelly v. Washington,* 302 U. S. 1, 10, 58 Sup. Ct. 87 (1937).

Your Honorable Court held in *Hines v. Davidowitz,* 312 U. S. 52, 67, 61 Sup. Ct. 399 (1941), that the controlling question is "whether, under the circumstances of this particular case, Pennsylvania law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Even where a federal agency charged with regulating certain phases of interstate commerce has authority to override state law, this Court has held such authority may be exercised only where necessary to perform the function assigned the agency by Congress: *Florida v. U. S.,* 282 U. S. 194, 51 Sup. Ct. 119 (1931).

Clearly, no such necessity exists in this case because, as the Fourth Circuit suggested, the FPC can regulate the interstate rates and services of Penn Water without imposing upon it a contract which is in violation of state law and public policy. Especially is this true where, as in the instant case, the illegality of the Baltimore contract arises out of the fact that it deprives Penn Water of the power

to initiate rates and services in the first instance, which power the D. C. Circuit concedes (R. Vol. XVIII, p. 5374) to be "a condition precedent to the proper operation of the rate-making process."

The D. C. Circuit by affirming the orders of FPC has effectively approved a principle of law which permits FPC to require performance by Penn Water of contracts which have been declared illegal and void as violating the law of the state of incorporation.

(b) Findings regarding jurisdiction and allocation of reduction in rates.

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(1) *FPC based its jurisdiction on the contracts*

FPC in its first opinion (R. Vol. XVI, pp. 4859-60) makes it clear that its decision as to jurisdiction over Penn Water's sales in Pennsylvania is based upon the fact that the facilities of Penn Water, Transmission Company, Safe Harbor and Baltimore Company are "operated as an integrated and coordinated electric system" and that all of Penn Water's and Transmission Company's facilities are "integral parts of that system". FPC states that

the illegal contracts "were designed to facilitate this completely integrated operation of system generating and transmitting facilities" and calls them the "system foundation contracts" (R. Vol. XVI, p. 4859). The existence of the so-called integrated and coordinated system is plainly dependent upon the restrictive provisions of the agreements through which Consolidated controls the other companies. FPC shows this by its reference to Article VIII which not only provides for intercompany cooperation but also prohibits Penn Water from taking any action with respect to operating, engineering and accounting matters without the consent of a representative of Consolidated. The Safe Harbor contract contains a similar provision (Article XIV, R. Vol. XV, p. 4567) specifically held illegal by the District Court of Maryland (R. Vol. XVIII, p. 5366). Similarly FPC refers to "the provisions for over-all compensation to Penn Water and Safe Harbor without regard to the amounts delivered" (the illegal revenue pooling provisions) as "Contributing to the accomplishment of complete integration" (R. Vol. XVI, p. 4860).

FPC also predicates its decision as to jurisdiction on the intermingling of power purchased from Consolidated with other power produced by Penn Water for the purpose of sale to the Pennsylvania customers (R. Vol. XVI, pp. 4860-1). This

intermingling, as the FPC stated, is likewise dependent upon the illegal contracts.

Speaking with regard to the contracts, it stated (R. Vol. XVI, p. 4861):

> "The very purpose of the system foundation contracts was the elimination of artificial barriers, such as State boundaries. In the making of sale of system barriers, such as those by Penn Water to its Pennsylvania utility customers, no distinction is made between energy crossing a State boundary and that which does not. Likewise, title to energy flowing on the system is of no significance among the companies comprising the system since they physically function as one enterprise and since the compensation features of the system contracts are so designed as to render consideration of title unimportant.
>
> "In the light of the foregoing facts, each of Penn Water's sales in Pennsylvania is clearly a system transaction of a character wholly [19] interstate even though at times it involves varying amounts of energy never crossing the State boundary, sometimes unmixed and sometimes mixed with out-of-state energy. In short, Penn Water is selling interstate system energy to purchasers outside the system. Such sales are sales "in interstate commerce".

Disposing of the contention that there existed a joint rate, the Commission said (R. Vol. XVI, p. 4863):

> "In the first place, Safe Harbor sells its entire output to Penn Water and Baltimore Company and having received payment therefor constituting its entire revenue, it cannot sell any part of it to Penn Water's Pennsylvania customers. And while the [21] system operations are coordinated, the compensation features of the contracts by which Safe Harbor and Penn Water sell to Baltimore Company clearly refute any suggestion of 'joint rate' ".

In its opinion (February 28, 1949) denying rehearing, FPC pointed out (R. Vol. XVI, p. 5186) that "refusal of Penn Water to receive energy originating outside of Pennsylvania from Baltimore Company" could not be effected in compliance with the contract. This is due to the fact that under Article IV (R. Vol. XV, p. 4612) Penn Water cannot purchase the supplemental energy which it needs to supply its Pennsylvania customers from any one other than Consolidated without Consolidated's consent.

Under applicable decisions of this Court, argued supra, the mere mingling of the power purchased from Consolidated with that produced and sold by Penn Water in Pennsylvania would not afford a

basis for FPC assuming jurisdiction. Illegal and invalid contracts requiring such intermingling of energy and tying the companies together into a so-called "integrated system" cannot be deemed in law to be a proper basis for holding such sales in Pennsylvania to be sales in interstate commerce.

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(2) *Allocations of Rate Reductions*

FPC found that for the test year 1946 Penn Water's revenues, per books, for services to Consolidated were shown as $1,399,331.10 (R. Vol. XVI, p. 4958). It also found that Penn Water's net cost of service to Consolidated was $652,933 (R. Vol. XVI, p. 4980). Penn Water actually received from Consolidated in 1946 only $1,104,951.85. Accepting, arguendo, FPC's findings, it would appear that Penn Water's revenues from Consolidated were excessive by approximately $747,000. In contrast FPC's finding No. 33 (R. Vol. XVI, p. 4992-4993) reads:

> "On the basis of a reasonable and proper allocation of the cost of service rendered by Penn Water and Transmission Company to Baltimore Company, the rates and charges to Baltimore Company for 1946 are unjust and unreasonable by approximately $1,733,318."

This glaring discrepancy is explained by FPC's adjustment of Penn Water's actual revenues as shown by the books by an amount of $1,127,699, so that, with certain other adjustments not here material, it concluded that Penn Water was theoretically to be regarded as receiving in revenues from Consolidated in 1946 the sum of $2,386,311 (R. Vol. XVI, p. 4959, 4961, 4980).[9] This extraordinary adjustment in revenues arose entirely from acceptance and recognition of alleged "entitlements" of Consolidated to Penn Water's output under the contract.

Without the Baltimore contract, the FPC could not have found the dollar amounts which it treated Penn Water as having received from Consolidated. Nor could it have found the dollar amounts which it did find to represent Penn Water's cost of service to Consolidated. Without the Baltimore contract, FPC could not have found that, of the ordered $1,954,261 reduction in rates,[9] approximately 89%

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[9] The FPC found Penn Water's revenues for the test year 1946 to have been "excessive" in an amount of $2,176,786. Of this figure $222,475 was deemed to be excess revenues received from the Railroad which the Commission did not purport to regulate. In consequence, the actual reduction ordered came to $1,954,261, of which $1,733,318, or approximately 89%, was allocated to Baltimore Company.

should be allocated to Baltimore Company (R. Vol. XVI, p. 4980).

The major adjustment of $1,127,699 represents a transfer by FPC to revenues from Consolidated of net interchange revenues actually received by Penn Water from the sale of energy to PP&L, ME, and PE (R. Vol. XVI, p. 4961). FPC's explanation for this adjustment is somewhat cryptic, but it clearly arises out of acceptance of "entitlements" to Penn Water's energy under the invalid Baltimore contract. The Commission said (R. Vol. XVI, p. 4979):

> "As interchange sales in Pennsylvania are on a when-as-and-if basis, the mwh so supplied by Penn Water comes from Baltimore Company's contract residual entitlement to Penn Water's resources and are therefore deemed to have been made for Baltimore Company's account."

FPC construed the Baltimore contract to entitle Consolidated to all of Penn Water's electric capacity and energy not otherwise disposed of under existing contracts approved by Consolidated (R. Vol. XVI, p. 4986). "Contracts" for the sale of energy in the invalid Baltimore contract were construed by FPC to refer only to existing contracts for the sale of firm energy. In other words, although FPC found (R. Vol. XVI, p. 4988) that Penn Water

under its arrangements with PP&L, ME and PE not only sells firm energy, but also buys and sells in interchange transactions, for purposes of cost allocation the Baltimore contract provisions regarding "entitlements" cause Consolidated to receive all the residue of Penn Water's energy output after only its firm commitments to the Pennsylvania customers had been met.

The significant fact is that FPC increased Penn Water's alleged revenues from Consolidated by over $1,000,000 because it regarded Penn Water's net interchange revenues from sales of energy as being made out of Consolidated's contractual "entitlement" and thus for Baltimore Company's account.

The net revenues from interchange transactions with Pennsylvania customers are billed to and received from those customers. They are not revenues from Baltimore Company. The contract being illegal and void, there cannot be any contractual "entitlement" whatever to any of Penn Water's output by Consolidated. Not even FPC may continue to regard as revenues received from Consolidated those revenues which Penn Water actually received from the Pennsylvania customers. Clearly FPC's adjustment of $1,127,699 net interchange revenue is improper. The $1,127,699 does not represent additional revenue from Consolidated. This conclusion of FPC is wholly unsupportable in that

it is premised upon "entitlements" under a contract which has been declared illegal, invalid and unenforceable.

The D. C. Circuit has approved determination by FPC of an allocation of reduction in rates which has as its sole basis the judicially declared illegal and void contracts. FPC reallocated revenues and expenses of Penn Water in determining the excess of revenue earned above a fair return. Findings of cost allocations were made and a reduction of rates directed in direct proportion of the excess revenue to such reallocated cost. Each of the above are based on provisions of the illegal contracts.

FPC's finding with regard to revenues and expenses are based upon the provisions of the contract (R. Vol. XVI, p. 4961):

> "Instead of showing the net revenue from interchange power as a credit item to operating expenses, the amount thereof, $1,127,699 has been added to revenues from Baltimore Company."

With regard to the allocation of costs, the Commission made the following observations:

(a) Division of cost of service between Consolidated and Pennsylvania customers (R. Vol. XVI, p. 4963):

> "By combining recomputed firm power services rendered Baltimore Company by both

Penn Water and Safe Harbor, Respondents' witness Spaulding testified that costs applicable to such services exceeded the recomputed billing by the amount of $266,578. Important bases for Spaulding's determination were the assumptions that Safe Harbor and Penn Water render joint services to Baltimore Company, and that Baltimore Commpany does not have a right or contract entitlement to two-thirds of Safe Harbor's output."

(b) Allocation of transmission facilities:

1. 220 KV. 60 Cycle Lines and Switching Stations (R. Vol. XVI, p. 4965):

"The allocation of the witness Spaulding is based upon his view that the transmission of energy from Baltimore to Pennsylvania does not relate to the firm demand requirements of any of the [147] Pennsylvania customers except the Railroad and that the supply to the Railroad is in part a responsibility of Baltimore Company.[112]

"[112] He considers the problem as if Baltimore Company's entitlement to power and energy from Safe Harbor did not exist. This interpretation of the subordination of entitlement is neither necessary nor supportable."

2. Safe Harbor-Perryville Line, Conestoga Substation and Perryville Switching Station (R. Vol. XVI, p. 4967):

> "On the other hand, Staff witness Davis allocated the substation 47% to Baltimore Company and 53% to the Railroad in Pennsylvania, and the line and switching station 91% to Baltimore Company and 9% to the Railroad in Pennsylvania, in each instance on the basis of energy flows over the facilities and on the ground that these facilities were used not only for service to the Railroad in Pennsylvania and Maryland, but also for the rendering of interchange services to Philadelphia Company on the behalf of Baltimore Company from the residual of energy to which the latter is entitled under its contract."

(c) Allocation of 25 Cycle Production Facilities to Pool (R. Vol. XVI, p. 4969):

> "Spaulding's 50.15% determination involves acceptance of his estimate of dependable hydro capacity and also his combining the dependable capacity for both Penn Water and Safe Harbor without regard to the Baltimore Company's entitlement (contract proportion) in [152] determining the capacity service rendered Baltimore Company."

"In charging Pennsylvania customers equitably for energy received, it becomes necessary and proper to first charge Baltimore Company with all of the hydro capacity and energy received and to credit it for all steam capacity and energy supplied by it and all hydro capacity and energy diverted from it."

(d) Capacity available to Baltimore Company (R. Vol. XVI, p. 4976):

"[162]

	Holtwood Steam (kw)	Holtwood Hydro (kw)	Safe Harbor Hydro (kw)	Total (kw)
Dependable capacity	28,000	91,740	158,260	278,000
Less prorated station use and line losses	2,216	7,260	12,524	22,000
	25,784	84,480	145,736	256,000
Less Baltimore Co.'s 2/3rds of Safe Harbor's capacity			97,157	97,157
Less 25 cycle to Highlandtown		41,480		41,480
	25,784	43,000	48,579	117,363
Demands in Pennsylvania				153,512
Balance to be supplied by Baltimore Company				36,149"

(e) Unit costs for capacity and firm energy and further allocations (R. Vol. XVI, p. 4979):

"As interchange sales in Pennsylvania are on a when-as-and-if basis, the mwh so supplied by Penn Water comes from Baltimore Company's contract residual entitlement to Penn Water's

resources and are therefore deemed to have been made for Baltimore Company's account."

With regard to the allocation of rate reduction, the Commission applied the provisions of the illegal and void contracts (R. Vol. XVI, p. 4981):

> "Under the arrangements now in effect the sales to Pennsylvania Power & Light Company, Philadelphia Electric Company and Metropolitan Edison Company are made on a firm basis and Baltimore Company takes what is left. In fact, Baltimore Company in times of severe water shortage may carry the main burden of supplying the foregoing Pennsylvania customers.
>
> "[167] It is not feasible, because of the nature of Penn Water's operations, for the latter to assume firm commitments to all its customers, including Baltimore Company. The present arrangement whereby sales to Pennsylvania customers are made on a firm basis on definite rate schedules whereas Baltimore Company takes what is left and assures Respondents of the recovery of all proper operating expenses, depreciation, taxes and a fair return, is the most practicable under the circumstances. That arrangement will, therefore, be continued with, however, such modifications as are necessary to accomplish the reductions mentioned

above to Pennsylvania Power & Light, Philadelphia Company, Metropolitan Company and Baltimore Company."

FPC, having allocated costs on the basis of contractual entitlements, concluded that the difference between total allowable costs and total revenues, thus determined, represented the excess amounts earned by the rates of Penn Water and accordingly determined the percent of excess revenues (R. Vol. XVI, p. 4980):

"The allocated special facility costs added to the allocated hydro capacity cost and the allocated cost of capacity supplied by Baltimore Company (supra) and to firm energy costs give total allocated costs which compare with total revenues as follows:

"[166]

PP&L Co.	$1,877,818	$1,958,356	$ 80,538	3.70
Philadelphia Company	834,550	948,861	114,311	5.25
Metropolitan Company	641,361	667,455	26,094	1.20
Railroad (in Pa.)	1,261,323	1,483,798	222,475	10.22
Baltimore Company	652,993	2,386,311	1,733,318	79.63
Total	$5,268,045	$7,444,781	$2,176,736	100.00"

The D. C. Circuit, in affirming the order of FPC, was clearly in error in permitting a determination of FPC jurisdiction on the basis of the provision of the illegal contracts and in permitting a determination of allocation of costs and revenues on the basis

of the illegal provisions of entitlement and in directing a rate reduction, based on the result of such allocations.

Further irrespective of the invalidity of the contracts there is no reasonable basis for application of a fiction of entitlements where the amount of energy actually sold by and to the respective parties is known. Fiction is at war with reality. The realities of the relationship are illustrated only by the actual sale and purchase of energy as were reflected on the books of Penn Water, Safe Harbor and Consolidated.

Failure of FPC to accept the business practices reflected by books of parties themselves was so arbitrary and capricious as to amount to an error of law.

CONCLUSION

Pennsylvania Public Utility Commission respectfully urges your Honorable Court the importance of the instant case to it, the administrative body charged with the power and duty to enforce the Pennsylvania Public Utility Law, and to Pennsylvania customers of Pennsylvania Water and Power Company.

Argument

The issues before your Honorable Court relate to the power and duty of your petitioner with regard to regulation of intrastate sales of energy by Pennsylvania Water and Power Company, and to the power of FPC to require continued performance of contractual provisions which are not only invalid but also illegal as being contrary to public policy and the laws of the Commonwealth of Pennsylvania. There is also challenged the power of a regulatory body such as FPC to dispense favor to one utility as against another, as well as the power to disregard fact, reality and accepted business principles and to indulge in theory and fiction. By such indulgence FPC has assumed power, and the D. C. Circuit Court has placed thereon the sanction of the law, to arbitrarily discriminate in the allocation of rate reductions not only between utilities but between people of the several states.

Pennsylvania Public Utility Commission respectfully submits that the D. C. Circuit Court was in error in (1) holding that sales of energy produced and sold within the Commonwealth of Pennsylvania, mingled at times with energy from another state, constituted sales in interstate commerce, notwithstanding that the respective amounts were ascertainable and that the amount flowing from another state represented an insignificant portion of the total; (2) holding that FPC had power to require a Pennsylvania public utility to perform contracts

which were illegal in the state of Pennsylvania, and (3) holding that FPC may disregard the actual sales in fact and effect an allocation of a reduction in rates on the basis of contractual entitlements.

Your Honorable Court is respectfully requested to uphold the errors assigned and to annul the orders of FPC or, in the alternative, to remand the case to FPC with appropriate directions.

Respectfully submitted,

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APPENDIX A

TEXT OF PERTINENT STATE STATUTES (EXCERPTS)

Pennsylvania Public Service Company Law.*

Article I—Definitions

"Section 1. * * *

"The term 'Public Service Company', when used in this act, includes all * * * water-power corporations * * *".

Article II—Duties and Liabilities of Public Service Companies

"Section 1. It shall be the duty of every public service company—

"(a) To furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate, and practically sufficient for the accommodation and safety of its patrons, em-

*Approved July 26, 1913, Pamphlet Laws 1374 (Effective January 1, 1914) as amended and supplemented.

ployees, and the public, and in conformity with such reasonable regulations or orders, as may be made by the commission.

"(b) To render and furnish all such service at prices, charges, rates, tolls, fares or compensation that shall be just and reasonable, and in conformity with such reasonable regulations or orders as may be made by the commission.

"(c) To make all such repairs, changes, alterations and improvements in or to such service, including facilities, as shall be reasonably necessary for the accommodation or safety of its patrons, employes and the public. * * *"

Article III—Creation, Powers and Limitation of Powers, of Public Service Companies

"Section 3. Upon like approval of the commission first had and obtained, as aforesaid, and upon compliance with existing laws, and not otherwise, it shall be lawful—

* * * * * * * *

"(c) For any public service company to sell, assign, transfer, lease, consolidate, or merge its property, powers, franchises, or privileges, or any of them, to or with any other corporation or person."

Text of Pertinent State Statutes

Pennsylvania Public Utility Law.*

Article I—Short Title and Definitions

"Section 2. Definitions.—The following words, terms and phrases shall have the meanings ascribed to them in this section, unless the context clearly indicates otherwise.

* * * * * * *

"(17) 'Public Utility' means persons or corporations now or hereafter owning or operating in this Commonwealth equipment, or facilities for:

"(a) Producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat or power to or for the public for compensation; * * *"

Article II—Certificate of Public Convenience

"Section 202. Enumeration of Acts Requiring Certificate.—Upon approval of the commission, evidenced by its certificate of public convenience first

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* Approved May 28, 1937, Pamphlet Laws 1053 (Effective June 1, 1937), as amended and supplemented. (66 Purdon's Pennsylvania Statutes Annotated, Sec. 1101 *et seq.*) This law superseded the Public Service Company Law.

had and obtained, and upon compliance with existing laws, and not otherwise, it shall be lawful:

* * * * * * * * *

"(d) For any public utility to dissolve, or to abandon or surrender, in whole or in part, any service, rights, power, franchise, or privilege: * * *.

"(e) For any public utility, except a common carrier by railroad subject to the Interstate Commerce Act, to acquire from, or to transfer to, any person or corporation, including a municipal corporation, by any method or device whatsoever, including a consolidation, merger, sale or lease, the title to, or the possession or use of, any tangible or intangible property used or useful in the public service: * * *."

Article III—Rates and Rate Making

"Section 301. Rates to Be Just and Reasonable. —Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable, and in conformity with regulations or orders of the commission: * * *."

Article IV—Service and Facilities

"Section 401. Charter of Service and Facilities. —Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and

facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons, employes and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this act and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. * * *."

Pennsylvania Laws Governing Corporations.

Section Five of Corporation Act of 1874.*

The business of every corporation created hereunder, or accepting the same, shall be managed and conducted by a president, a board of directors or trustees, a secretary or clerk, a treasurer, and such other officers, agents and factors as the corporation authorizes for that purpose, * * *. The members of said corporation may, at a meeting to be called for that purpose, determine, fix or change the number of

* As amended by Act of May 14, 1891, P. L. 61, and Act of May 6, 1927, P. L. 828 (No. 417).

directors or trustees that shall thereafter govern its affairs, and a majority of the whole number of such directors or trustees shall be necessary to constitute a quorum * * *.

Section one of Act of May 31, 1887, P. L. 281 (No. 166).

SECTION 1. *Be it enacted, &c.,* That it shall be lawful, from and after the passage of this act, for any corporation, chartered or existing by or under any law of this State, to determine, by the vote of its stockholders holding a majority in interest of all of its stock, at a meeting duly called for the purpose, the time of holding the annual meeting for the election of officers of the corporation, and the number of directors that shall thereafter govern its affairs: *Provided,* That the number of directors so determined shall not be less than three nor more than fifteen, and that at least one third of the directors of every corporation shall be and remain, during their term of service, residents of the State of Pennsylvania: * * *.